# DOCKET

No. 86-1357-CFX  Title: United States Department of Justice, et al.,
Status: GRANTED  Petitioners
v.
Kenneth Michael Julian and Margaret J. Wallace

Docketed:
February 18, 1987  Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Glitzenstein,Eric R.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Feb 18 1987 | G | Petition for writ of certiorari filed. |
| 2 | Mar 25 1987 | | DISTRIBUTED. April 17, 1987 |
| 3 | Apr 13 1987 | P | Response requested -- BRW, SOC. (Due May 13, 1987) |
| 4 | May 13 1987 | G | Motion of respondent Julian for leave to proceed in forma pauperis filed. |
| 5 | May 13 1987 | | Brief of respondent Kenneth Michael Julian in opposition filed. |
| 6 | May 26 1987 | | REDISTRIBUTED. June 11, 1987 |
| 7 | Jun 15 1987 | | Motion of respondent Julian for leave to proceed in forma pauperis GRANTED. |
| 8 | Jun 15 1987 | | Petition GRANTED. |
| | | | ********** |
| 9 | Jun 15 1987 | | Brief of respondent in opposition filed. |
| 11 | Jul 30 1987 | | Order extending time to file brief of petitioner on the merits until August 7, 1987. |
| 12 | Aug 6 1987 | | Order further extending time to file brief of petitioner on the merits until August 10, 1987. |
| 13 | Aug 10 1987 | | Brief of petitioner U.S. Dept. of Justice filed. |
| 17 | Sep 1 1987 | | Record filed. |
| 14 | Sep 8 1987 | G | Motion of respondent Margaret J. Wallace for leave to proceed further herein in forma pauperis filed. |
| 16 | Sep 8 1987 | | Order extending time to file brief of respondent on the merits until October 16, 1987. |
| 18 | Oct 20 1987 | | DISTRIBUTED. Oct 30, 1987 Conf. (Motion of respondent for leave to proceed in forma pauperis). |
| 19 | Nov 2 1987 | | Motion of respondent Margaret J. Wallace for leave to proceed further herein in forma pauperis GRANTED. |
| 20 | Nov 2 1987 | | Brief of respondents Kenneth Michael Julian, et al. filed. |
| 21 | Nov 5 1987 | G | Motion of the Solicitor General to dispense with printing the joint appendix filed. |
| 22 | Nov 16 1987 | | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. |
| 23 | Nov 23 1987 | | SET FOR ARGUMENT. Tuesday, January 19, 1988. (1st case). |
| 24 | Dec 14 1987 | | CIRCULATED. |
| 25 | Jan 7 1988 | X | Reply brief of petitioner U.S. Dept. of Justice filed. |
| 26 | Jan 19 1988 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

86-1357

No.

Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether a presentence investigation report, which was prepared for use by the federal district court in sentencing the defendant and then was transmitted to the Parole Commission for use in determining his parole date, is subject to mandatory disclosure under the Freedom of Information Act, 5 U.S.C. (& Supp. III) 552.

## PARTIES TO THE PROCEEDINGS

Petitioners seek review of the single decision of the United States Court of Appeals for the Ninth Circuit in consolidated appeals in two cases arising under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552. Those cases were brought in different federal district courts:

1. Respondent Kenneth Michael Julian was the plaintiff in the suit brought in the United States District Court for the District of Arizona. The defendant in that suit was petitioner Department of Justice.

2. Respondent Margaret J. Wallace was the plaintiff in the suit brought in the United States District Court for the Northern District of California. The named defendants in that suit were petitioners United States Parole Commission and Charles Turnbo, the Warden of the Federal Correctional Institution at Pleasanton, California.*

*Petitioner Turnbo apparently was named because respondent Wallace styled her action as a petition for a writ of habeas corpus under 28 U.S.C. 2241 (E.R. 11), although the district court thereafter treated it as a suit under the FOIA (App., *infra*, 17a). The proper defendant in a suit under the FOIA is the agency that withheld the document. See 5 U.S.C. 552(a)(4)(B). Petitioner Turnbo therefore was not a proper defendant insofar as this case was permitted to proceed under the FOIA.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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The Solicitor General, on behalf of the Department of Justice, the United States Parole Commission, and the Warden of the Federal Correctional Institution at Pleasanton, California,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 806 F.2d 1411. The orders of the district courts (App., *infra*, 16a, 17a-22a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 30, 1986.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] See page ii note *, *supra*.

[2] The practice of the Court of Appeals for the Ninth Circuit is to issue a copy of its mandate as the judgment. Because the court of appeals has stayed the issuance of its mandate, no separate document constituting the court's judgment has yet been issued.

## STATUTORY PROVISIONS, RULE, AND REGULATIONS INVOLVED

Relevant provisions of the Freedom of Information Act, 5 U.S.C. 552(a)(3) and (4)(B), (b)(3) and (5); the Parole Commission and Reorganization Act of 1976, 18 U.S.C. 4203(a)(1), 4205(e), 4207 and 4208; Rule 32(c) of the Federal Rules of Criminal Procedure; and the Parole Commission regulations governing disclosure of information, 28 C.F.R. 2.55 and 2.56, are reproduced at App., *infra,* 35a-47a.

## STATEMENT

This case presents the question whether a presentence report that was prepared by the probation service for use by the district court at sentencing, and was then transmitted to the United States Parole Commission for its use in making parole determinations about the prisoner, is subject to mandatory disclosure by the Parole Commission under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552.

### A. The Legal Framework Governing Presentence Reports

1. *Use and Disclosure Of The Presentence Report By The District Court*

Rule 32(c)(1) of the Federal Rules of Criminal Procedure provides that when the defendant in a federal criminal prosecution has been found guilty, the probation officer must make a presentence investigation and submit a report to the court before the imposition of sentence, unless the defendant waives that requirement or the court finds that the record already contains sufficient information to permit a meaningful exercise of its sentencing discretion.[3] The presentence report must contain information concerning the prior criminal record of the defendant; the circumstances of the offense and the defendant's behavior; financial, social, psychological, physical or other harm to the victim; and any other information that may aid the court in sentencing, including the restitution needs of the victim. Fed. R. Crim. P. 32(c)(2).



Rule 32(c)(3)(A) provides that, prior to sentencing, the district court shall permit the defendant and his counsel to read the presentence report, exclusive of any recommendation as to sentencing. The court then must afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to alleged inaccuracies. *Ibid.* However, the defendant and his counsel do not have a right to read the report to the extent that it contains: (i) diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation; (ii) sources of information obtained upon a promise of confidentiality; and (iii) any other information that, if disclosed, might result in harm to the defendant or other persons. *Ibid.* If the court intends to rely at sentencing on any factual material falling in one of these three exceptions, it must furnish a written or oral summary and afford the defendant and his counsel an opportunity to comment upon the summary. Fed. R. Crim. P. 32(c)(3)(B). Any material that may be disclosed to the defendant and his counsel must also be disclosed to the attorney for the government. Fed. R. Crim. P. 32(c)(3)(C).

If the evidence or comments introduced by the defendant or his counsel allege any factual inaccuracy in the report or summary, the court must either make a finding regarding the allegation or determine that no such finding is necessary because the controverted matter will not be

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[3] The probation officer performs this and other functions under the direction of the district court. 18 U.S.C. 3654.

considered in imposing sentence. A written record of any such finding or determination must accompany the copy of the report that is subsequently transmitted to the Bureau of Prisons or the Parole Commission. Fed. R. Crim. P. 32(C)(3)(D); see page 5, *infra*.

Finally, Rule 32(c)(3)(E) provides that any copies of the presentence report that are made available to the defendant, his counsel, and the attorney for the government "shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs." Thus, although the defendant has a right to read his presentence report (except for portions that may be summarized) prior to sentencing, the defendant has no right to retain a copy of the report itself unless the court affirmatively authorizes him to do so. In addition, the courts have uniformly held that a presentence report is privileged from disclosure to a third party, at least in the absence of a showing of particularized need. See pages 11-12, *infra*.

2. *Use And Disclosure Of The Presentence Report By The Parole Commission And Bureau of Prisons*

a. If the defendant is sentenced to a term of imprisonment, the date on which he will be released on parole is determined by the Parole Commission, an agency in the Department of Justice that was established by the Parole Commission and Reorganization Act of 1976, 18 U.S.C. (& Supp. III) 4201 *et seq*. See 18 U.S.C. 4202. In making a parole decision, the Commission is required to consider the presentence report (18 U.S.C. 4207(3)), as well as reports submitted by the correctional institution, the prisoner's criminal record, any recommendation by the sentencing court, and the results of various examinations. 18 U.S.C. 4207. Accordingly, it is "the duty of the various probation officers and government bureaus and agencies"



to furnish to the Commission, upon request, any available information about the prisoner. 18 U.S.C. 4205(e). The probation officer typically discharges this duty by furnishing a copy of the presentence report.

The presentence report is also utilized by the Bureau of Prisons in determining the proper classification of the prisoner (see 28 C.F.R. 524.10, 524.12(e)), appropriate treatment programs, and his eligibility for furloughs and other privileges. See Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1679 (1980). Although Congress has not by law required the probation officers to furnish presentence reports to the Bureau of Prisons, they have done so for many years and Fed. R. Crim. P. 32(c)(3)(D) now expressly endorses that practice. See Fennell & Hall, *supra*, 93 Harv. L. Rev. at 1679; 97 F.R.D. 245, 306, 308 (1983) (advisory committee note on 1983 Amendments to Rule 32(c)).

The Bureau of Prisons, like the Parole Commission, is an agency of the Department of Justice (18 U.S.C. 4041, 4042), and its use of the presentence report is closely coordinated with that of the Commission. For example, although 18 U.S.C. 4205(e) requires the probation officer to furnish the report to the Parole Commission, in practice the probation officer furnishes the report in the first instance to the Bureau of Prisons, which has a more immediate need for it in determining the appropriate security level for the prisoner. See Schmolesky & Thorson, *The Importance of the Presentence Investigation Report After Sentencing*, 18 Crim. L. Bull. 406, 408-409 (1982).

b. The Parole Act provides that at least 30 days prior to a parole hearing, the prisoner shall be provided with "reasonable access to a report or other document to be used by the Commission in making its determination." 18 U.S.C. 4208(b). Implementing Parole Commission regula-

tions provide that since the Commission's file consists mainly of documents furnished to it by the Bureau of Prisons, access to documents used by the Commission ordinarily can be accomplished by disclosure of documents in the prisoner's institutional file. 28 C.F.R. 2.55(a)(1). Under settled practices pursuant to 18 U.S.C. 4208(b), the prisoner may only read the copy of his presentence report in the institutional file and may not receive a copy of it. See also 28 C.F.R. 2.55(a)(3).[4] In addition, the Parole Commission's regulations governing disclosure of documents from its own files provide that "[a]ny request for copies of court documents (including the presentence investigation report) must be directed to the appropriate court." 28 C.F.R. 2.56(b). The Parole Commission thus defers to the decision of the sentencing court, pursuant to Fed. R. Crim. P. 32(c)(3)(E), as to whether the prisoner will be permitted to obtain a copy of his presentence report after sentencing.

**B. The Proceedings In These Cases**

1.a. Respondent Kenneth Michael Julian is an inmate at the Federal Correctional Institution in Safford, Arizona. Julian is serving a ten-year term of imprisonment following his conviction in the United States District Court for the Eastern District of California for the unlawful manufacture of silencers and illegal weapons and the manufacture of methamphetamines. Pursuant to Fed. R. Crim. P. 32(c)(1), a presentence report was prepared on

[4] Under 18 U.S.C. 4208(b), a prisoner may be denied access to a document to the extent it contains information that falls within one of three categories that parallel the three exceptions in Fed. R. Crim. P. 32(c)(3)(A) for material that may be withheld from the defendant prior to sentencing. See page 3, *supra*. In that event, the Bureau of Prisons or the originating agency must furnish the prisoner with a summary of the information withheld. 18 U.S.C. 4208(c); 28 C.F.R. 2.55(c) and (d).



Julian by the probation office prior to sentencing. After he began serving his sentence, Julian requested a copy of his presentence report from the Parole Commission on October 17, 1984. When that request was denied, Julian brought an action in the United States District Court for the District of Arizona on January 30, 1985, seeking to compel the release of a copy of his presentence report under the FOIA. In a brief order dated August 5, 1985, the district court granted Julian's motion for summary judgment (App., *infra,* 16a).

b. Respondent Margaret J. Wallace was convicted in the United States District Court for the Central District of California on 15 counts of forging United States Treasury checks, in violation of 18 U.S.C. 495. She was sentenced to a term of three years' imprisonment. A presentence report was prepared by the probation officer prior to her sentencing. On November 1, 1984, while serving her sentence in the Federal Correctional Institution at Pleasanton, California,[5] Wallace filed a request with the Parole Commission for all of the Commission's records pertaining to her. On March 25, 1985, the Commission furnished Wallace with copies of all documents in the Commission's files, except for a copy of her presentence report and certain additional records that were already available in her institutional file at the Pleasanton FCI. Wallace then filed suit in the United States District Court for the Northern District of California seeking to compel release of a copy of her presentence report. By order dated September 6, 1985, the district court ordered the Parole Commission to release a copy of the presentence report to her under the FOIA (App., *infra*, 17a-22a).

[5] Respondent Wallace was released on parole on April 17, 1985 (App., *infra,* 17a), and completed serving her sentence on August 17, 1986.

2. The court of appeals consolidated the government's appeals in the two cases and affirmed the judgment in each (App., *infra*, 1a-15a). The court held that a prisoner has an absolute right under the FOIA to obtain a copy of the presentence report (except summarized portions) from the Parole Commission, even though Fed. R. Crim. P. 32(c)(3)(E) and the Parole Commission's procedures implementing the "reasonable access" requirement of the Parole Act (18 U.S.C. 4208(b)) confer a right only to read the report, not to receive a copy of it.

a. The court of appeals rejected the government's submission that the Parole Commission may withhold a copy of the presentence report from the prisoner under FOIA Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" (5 U.S.C. 552(b)(5)). App., *infra*, 9a-14a. In so doing, the court acknowledged (*id.* at 10a) that its holding conflicted with *Durns* v. *Bureau of Prisons*, 804 F.2d 701 (D.C. Cir. 1986).

The court of appeals recognized that Exemption 5 protects those documents that are " 'normally privileged in * * * civil discovery' " (App., *infra*, 10a, quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)) and that the courts have uniformly held that presentence reports are privileged from disclosure to third parties " 'unless lifting confidentiality is required to meet the ends of justice' " (App., *infra*, 11a-12a & n.6, quoting *United States* v. *Figurski*, 545 F.2d 389, 391 (4th Cir. 1976)). But the court held that those decisions do not justify withholding the report from the prisoner, because he is permitted by Rule 32(c)(3)(A) and 18 U.S.C. 4208(b) to inspect the report prior to his sentencing and parole hearing (App., *infra*, 12a).



b. The court of appeals also held that the Parole Commission's copy of a presentence report is not protected by Exemption 3, which provides that the FOIA does not apply to matters that are "specifically exempted from disclosure by statute" if the statute, inter alia, "refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3)(B). In its Exemption 3 analysis, the court focused on the information contained in the report, rather than the prisoner's right to obtain a copy of it. On this view, the court reasoned that Rule 32(c) and 18 U.S.C. 4208 do not exempt all information in a presentence report from disclosure, but rather permit the sentencing court and Parole Commission to withhold only such information as falls within one of the three exceptions in Rule 32(c)(3)(A) or 18 U.S.C. 4208(c)—*i.e.*, diagnostic opinions that might disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or other information that might result in harm to the subject of the report or to third parties. App., *infra*, 7a-9a.[6]

## REASONS FOR GRANTING THE PETITION

The court of appeals clearly erred in holding that copies of presentence reports in the possession of the Parole Commission are subject to mandatory release under the FOIA. A document is privileged under Exemption 5 if, as is true of a presentence report, it would not be *routinely* available in civil discovery. Presentence reports have always been treated as highly confidential documents, in order to assure that sources will not be deterred from furnishing information. Thus, under Fed. R. Crim. P. 32(c)(3)(E), even the defendant cannot retain a copy of the

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[6] The court indicated that if the requester were a third party, rather than the subject of the report, additional portions of the presentence report might be withheld under FOIA Exemption 6, which applies to matters the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

report after sentencing unless the court, in its discretion, permits him to do so. It is also well settled that a third party cannot obtain a copy of the presentence report absent a showing of particularized need. In view of this strict control over dissemination of the report by the originating court, it is obvious that Congress did not contemplate that the copy of the report that is furnished to the Parole Commission would be subject to mandatory release to members of the public at large under the FOIA.

The result should be no different in this case merely because the FOIA requesters are the subjects of the particular presentence reports at issue. Under the FOIA, the question is whether the document must be released to any member of the public, not to a person who might claim a special interest in its contents. Repondents therefore have no special standing under the FOIA to obtain copies of their presentence reports. In Fed. R. Crim. P. 32(c) and 18 U.S.C. 4208(b), Congress gave the subject of a presentence report a special but limited right of access to the report in those circumstances—prior to sentencing and prior to a parole hearing—in which he might have a particular need to read it. A prisoner cannot circumvent the limitations on that right of access by requesting a copy of the report under the FOIA, when the FOIA grants no such right to the general public.

As the court of appeals recognized, the decision below squarely conflicts with that of the District of Columbia Circuit in *Durns* v. *Bureau of Prisons*, 804 F.2d 701 (1986), and the question of the availability of presentence reports under the FOIA is a recurring one. The decision below also undermines the confidentiality of presentence reports that is essential to the ability of probation officers to gather necessary information about the defendant's background for use by the sentencing court, Parole Commission, and Bureau of Prisons. Review by this Court is therefore warranted.



1. Presentence reports in the possession of the Parole Commission and Bureau of Prisons are not subject to mandatory disclosure under the FOIA. A straightforward application of settled principles establishes that presentence reports are protected by Exemption 5 of the FOIA. In addition, in view of the express provisions in Rule 32(c) and 18 U.S.C. 4208 for limited access to presentence reports, they are protected by Exemption 3 as well.

a. Exemption 5 of the FOIA permits an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). It is well settled that "Exemption 5 incorporates the privileges which the government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Bd.* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). Accord, *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 26-27 (1983). As the District of Columbia Circuit recently observed, "[a]n impressive body of doctrine recognizes the privileged nature of presentence reports" (*Durns* v. *Bureau of Prisons*, 804 F.2d at 704). Indeed, the courts have uniformly recognized that a presentence report is privileged from disclosure to a third party, at least in the absence of a showing that disclosure is " 'required to meet [the] ends of justice' " (*id.* at 705, quoting *Hancock Bros.* v. *Jones*, 293 F.Supp. 1229, 1233 (N.D. Cal. 1968)). See *United States* v. *McKnight*, 771 F.2d 388, 390 (8th Cir. 1985), cert. denied, No. 85-1016 (Feb. 24, 1986); *United States* v. *Anderson*, 724 F.2d 596, 598 (7th Cir. 1984); *United States* v. *Charmer Industries, Inc.*, 711 F.2d 1164, 1172-1176 (2d Cir. 1983); *United States* v. *Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977); *United States* v. *Cyphers*, 553 F.2d 1064, 1069 (7th Cir.), cert. denied, 434 U.S. 843 (1977); *United States* v. *Dingle*, 546 F.2d 1378, 1380-1381 (10th Cir. 1976); *United States* v. *Figurski*, 545 F.2d 389,

391-392 (4th Cir. 1976); *United States* v. *Walker,* 491 F.2d 236, 238 (9th Cir.), cert. denied, 416 U.S. 990 (1974); *United States* v. *Greathouse,* 484 F.2d 805, 807 (7th Cir. 1973); *United States* v. *Evans,* 454 F.2d 813, 820 (8th Cir.), cert. denied, 406 U.S. 969 (1972); *United States* v. *Mayse,* 467 F. Supp. 1339 (E.D. Tenn. 1979); *United States* v. *Krause,* 78 F.R.D. 203 (E.D. Wis. 1978).[7]

The confidential and privileged nature of presentence reports under these decisions "reflects 'the prevailing judicial view that the public availability of presentence reports would likely inhibit the flow of information to the sentencing judge.' " *Durns* v. *Bureau of Prisons,* 804 F.2d at 705, quoting *United States* v. *Charmer Industries, Inc.,* 711 F.2d at 1173. See also *Williams* v. *New York,* 337 U.S. 241, 247-250 (1949); Fennell & Hall, *supra,* 93 Harv. L. Rev. at 1684-1685. To date the decisions recognizing a privilege for presentence reports have involved efforts to obtain a presentence report from the sentencing court. But the ability of the probation officers to obtain complete and accurate information would be seriously undermined if presentence reports were publicly available from *any* source. Accordingly, when Congress directed that probation officers furnish presentence reports to the Parole Commission (18 U.S.C. 4205(e)), it must have intended

[7] For the most part, the presentence report cases cited in the text involve efforts by the defendant in a criminal prosecution to obtain the presentence report of a co-defendant or witness, often in order to use the report for impeachment purposes. If presentence reports are privileged from routine release even in that setting, it should follow *a fortiori* that they are not routinely available in civil discovery. And, indeed, presentence reports have also been found to be privileged in civil proceedings, subject to release only for "the most compelling reasons." *United States* v. *Charmer Industries, Inc.,* 711 F.2d at 1174 (citation omitted). See also *United States* v. *Krause, supra; Hancock Bros.* v. *Jones, supra.* Compare *United States* v. *Sells Engineering, Inc.,* 463 U.S. 418, 442-445 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211, 221-224 (1979) (matters occurring before a grand jury may be disclosed only on a showing of particularized need).



that the privilege attaching to the report while it remains a court document would continue after the transmittal. *Durns* v. *Bureau of Prisons,* 804 F.2d at 705.[8]

[8] At one time, the Department of Justice took the position that copies of presentence reports in the possession of the Bureau of Prisons and Parole Commission were court documents, not "agency records" subject to the FOIA. See 5 U.S.C. 551(1)(B) (the term "agency" does not include "the courts of the United States"). That position was accepted by three courts of appeals. See *Lindsey* v. *Bureau of Prisons,* 736 F.2d 1462 (11th Cir. 1984); *Crooker* v. *Parole Comm'n,* 730 F.2d 1 (1st Cir. 1984); *Cook* v. *Willingham,* 400 F.2d 885 (10th Cir. 1968). Two other courts of appeals reached a contrary conclusion. See *Berry* v. *Dep't of Justice,* 773 F.2d 1343 (9th Cir. 1984); *Lykins* v. *Dep't of Justice,* 725 F.2d 1455 (D.C. Cir. 1984); *Carson* v. *Dep't of Justice,* 631 F.2d 1008 (D.C. Cir. 1980).

Thereafter, in the brief in opposition to the certiorari petition filed by the requester in *Crooker,* the Solicitor General represented that the Parole Commission would no longer withhold presentence reports on the ground that they are not "agency records" for purposes of the FOIA. That new position was taken in view of the importance of the presentence report in the parole determination, the Commission's control over the copy of the report in its possession, and the 1983 amendments to Fed. R. Crim. P. 32(c) that recognized the Commission's use and control of the report. See Br. in Opp. at 8-18, *Crooker* v. *Parole Comm'n, supra.* The Solicitor General further argued (*id.* at 18-20), however, that presentence reports are exempted from mandatory disclosure by Exemptions 3 and 5 of the FOIA. The Court granted the petition in *Crooker,* vacated the judgment below, and remanded for further consideration in light of the Solicitor General's new position. 469 U.S. 926 (1984). The Solicitor General thereafter took the same position in *Lindsey* with respect to presentence reports in the possession of the Bureau of Prisons, and the Court likewise remanded that case for further consideration. 469 U.S. 1082 (1984). On remand in *Crooker,* the First Circuit proceeded on the premise that presentence reports are "agency records," rejected the Parole Commission's Exemption 3 claim, declined to consider the Commission's Exemption 5 claim because it had not been raised below, and ordered release of the report. *Crooker* v. *Parole Comm'n,* 760 F.2d 1 (1985). The Eleventh Circuit has not yet rendered a decision on remand in *Lindsey.*

Because the copy of a presentence report in the possession of the Bureau of Prisons or Parole Commission would be privileged from disclosure in civil discovery in litigation with either agency, it is protected by Exemption 5 from mandatory disclosure under the FOIA. That protection is not undermined by the fact that some courts have stated that a particular litigant might be able to overcome a claim of privilege in civil discovery by showing that the ends of justice require disclosure of the presentence report. *Durns* v. *Bureau of Prisons,* 804 F.2d at 705; *United States* v. *Charmer Industries, Inc.*, 711 F.2d at 1173; *United States* v. *Figurski,* 545 F.2d at 391-392; *Hancock Bros.* v. *Jones,* 293 F. Supp. at 1233. "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC* v. *Grolier, Inc.*, 462 U.S. at 26, quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 148-149 & n.16; *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 799. "This result, by establishing a discrete category of exempt information, implements the congressional intent to provide 'workable' rules." *FTC* v. *Grolier, Inc.*, 462 U.S. at 27, quoting S. Rep. 813, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. 1497, 89th Cong., 2d Sess. 2 (1966). Even if a particular litigant might be able to obtain a copy of a presentence report upon a showing of special need, presentence reports plainly are not *routinely* or *normally* available in civil discovery. They therefore may be withheld from the public under Exemption 5.[9]

[9] The legislative history of the Parole Act supports the conclusion that Congress did not intend a presentence report to be available to the public. The House of Representatives deleted a provision that would have exempted the Parole Commission from the requirement (now embodied in 5 U.S.C. 552(a)(5)) that each agency having more than one member must make available for public inspection a record of the final vote of each member. 121 Cong. Rec. 15715 (1975). Representative Danielson stated that he would have no objection to the amendment on the understanding that "it would not make public the record examined by the Parole Board." *Ibid.* The District of Columbia Circuit observed in *Carson* v. *Dep't of Justice, supra*, that although this comment did not have a bearing on the question whether the Parole Commission's copy of a presentence report is an "agency record," it "is probably relevant to the question of the applicability of the FOIA's exemptions" (631 F.2d at 1015). The court of appeals in the instant case failed to discuss this legislative history.



b. The court of appeals in this case did not dispute that presentence reports are ordinarily privileged from discovery under the decisions discussed above. See App., *infra,* 11a-12a. However, the court held that those decisions "do not create a privilege which justifies withholding presentence reports when a FOIA request is made by the subject of the report" (*id.* at 12a). This holding fundamentally misconceives the purposes of the FOIA and Exemption 5.

It is true that the subject of a presentence report has a limited right of access to the report in certain circumstances under Fed. R. Crim. P. 32(c) and 18 U.S.C. 4208(b). See pages 17-20, *infra.* But even if we assume arguendo that these special statutory provisions indicate that the subject of the report also would have a special right of access to the report *outside* of the sentencing or parole-hearing context—specifically, in discovery in litigation with the Parole Commission or Bureau of Prisons (but see *Harris* v. *Nelson,* 394 U.S. 286, 297-300 (1968))—it does not follow that he has a right to obtain a copy of the report under the FOIA. "That a particular individual with a special interest in or need for certain documents could obtain discovery of them does not mean that they are *normally* available to private parties on a showing of relevance." *Durns* v. *Bureau of Prisons,* 804 F.2d at 706 (emphasis added). See *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 802 n.20: *FTC* v. *Grolier, Inc.*, 462 U.S. at 27-28. The court below therefore erred in

fashioning a special exception to the privilege for presentence reports that is incorporated into Exemption 5.[10]

The principle that an asserted special interest or status of the requester does not afford him a unique right of access to documents under the FOIA is not confined to Exemption 5. The provision of the FOIA that prescribes the basic duty of disclosure provides that each agency "shall make available to the *public*" the categories of information to which it applies (5 U.S.C. 552(a) (emphasis added)). See *EPA* v. *Mink*, 410 U.S. 73, 79, 92 (1973). Similarly, 5 U.S.C. 552(a)(3), at issue here, requires that if the requested records have not already been published in the Federal Register or made available for public inspection pursuant to 5 U.S.C. 552(a)(1) and (2), the agency "shall make the records promptly available to *any person*" (emphasis added). These provisions give expression to the central premise that the FOIA "is fundamentally designed to inform the *public* about agency action and not to benefit private litigants." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 143 n.10 (emphasis added). Accordingly, the relevant question under the FOIA is whether the document must be made available to any member of the public upon request. Correspondingly, if one of the nine exemptions applies, the document may be withheld from any and all members of the public, irrespective of any particular person's asserted special status or interest. *Id.* at 149 n.16; *Kurzon* v. *HHS*, 649 F.2d 65, 68 n.2 (1st Cir. 1981); *Robles* v. *EPA*, 484 F.2d 843, 847 (4th Cir. 1973); 1 K. Davis, *Administrative Law* § 5.6 (2d ed. 1978).

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[10] "[T]he use of the indefinite article in Exemption 5 (i.e., 'would not be available to *a* party . . .') indicates that the scope of Exemption 5 is to be determined without regard to the particular circumstances or needs of any specific actual or hypothetical [requester]." *Brockway* v. *Dep't of the Air Force*, 518 F.2d 1184, 1192 n.7 (8th Cir. 1975).



c. The decision of the court of appeals not only subverts the basic thrust of the FOIA by recognizing a unique right of access for particular members of the public; it also allows and indeed encourages circumvention of the limited access procedures that Congress specifically fashioned for those individuals. Prior to 1975, there was no requirement in Fed. R. Crim. P. 32(c) that the defendant be permitted to read his presentence report prior to sentencing, much less to retain a copy of it after sentencing. A proposal to grant the defendant a right to review the report was included in Rule 32(c) as originally proposed in 1944, but it was deleted from the final version, in part because of concerns expressed by judges that sources of information might be deterred from cooperating. Fennell & Hall, *supra*, 93 Harv. L. Rev. at 1632. The disclosure of presentence reports to the defendant was again the subject of "heated controversy" prior to the 1966 Amendments to Rule 32(c). See advisory committee note to 1966 Amendments, 18 U.S.C. App. at 625. Although Rule 32(c)(2) was amended in that year to provide that the court "may disclose" some or all of the presentence report to the defendant or his counsel prior to sentencing, disclosure was not made mandatory. Fennell & Hall, *supra*, 93 Harv. L. Rev. at 1633; *United States* v. *Woody*, 567 F.2d 1353, 1358-1360 (5th Cir.), cert. denied, 436 U.S. 908 (1978).

In 1975, Rule 32(c)(3)(A) was amended to require for the first time that the presentence report be made available for inspection by the defendant or his counsel upon request. And in 1983, that rule was further amended to provide that even in the absence of a specific request, "the court shall permit the defendant and his counsel to *read* the report of the presentence investigation" prior to the imposition of sentence (emphasis added). As originally proposed by this Court in 1974, Rule 32(c)(3)(D) (now Rule 32(c)(3)(E)) expressly provided that any copies of the presentence report made available to the defendant, his

counsel, and the attorney for the government "shall be returned to the probation officer immediately following the imposition of sentence" and that copies of the report "shall not be made" by any of those persons. H.R. Doc. 93-292, 93d Cong., 2d Sess. 20-21 (1974). The advisory committee note explained that this restriction was intended "to insure that [presentence reports] do not become available to unauthorized persons" (*id.* at 71; 62 F.R.D. 271, 325 (1974)). However, the proposed rule was amended and enacted into law by Congress so as to provide that copies of the presentence report made available to the defendant, his counsel, and the attorney for the government "shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs." Pub. L. No. 94-64, § 3(34), 89 Stat. 376 (redesignated in 1983 as Fed. R. Crim. P. 32(c)(3)(E)). The House Judiciary Committee proposed this amendment because it believed that "[t]here may be situations when it would be appropriate for either or both of the parties to retain the presentence report" and that the court should have the "discretion" to permit them to do so. H.R. Rep. 94-247, 94th Cong., 1st Sess. 18 (1975).

Thus, the text and legislative history of Rule 32(c)(3)(E) unambiguously demonstrate that Congress—like this Court in proposing its version of the rule—deliberately declined to confer on the subject of a presentence report a right to obtain a copy of that report. The decision of the court of appeals that the subject of a presentence report has a right to obtain a copy of the very same report under the FOIA cannot be squared with that deliberate judgment by Congress and this Court. Indeed, the Court has repeatedly stressed that the FOIA cannot be utilized to circumvent such limitations on discovery. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 801-802; *Baldridge* v. *Shapiro*, 455 U.S. 345, 360 & n.14 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242-243 (1978); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 143 n.10; *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).



Nothing in the Parole Act suggests that the prisoner should have a right under the FOIA to receive a copy of the presentence report that was denied to him by the court pursuant to the express authorization in Rule 32(c)(3)(E). To the contrary, Congress included in the Parole Act a framework for limited access to presentence reports and other materials to be relied upon by the Parole Commission that is directly parallel to Fed. R. Crim. P. 32(c). It would have been surprising if Congress had chosen a different course, because Congress considered the Parole Act and the 1975 amendments to Rule 32(c) at the same time and the Parole Commission's decision regarding the portion of the sentence that the prisoner must serve in prison is, in effect, a continuation of the sentencing process. Cf. *United States* v. *Addonizio*, 442 U.S. 178, 188-190 (1979).

The Parole Act requires that the prisoner be granted "reasonable access" to the presentence report and other documents to be relied upon by the Commission. 18 U.S.C. 4208(b). Although this language requires that the prisoner be permitted to read the presentence report, as he would already have been permitted to do prior to sentencing, 18 U.S.C. 4208(b) does not by its terms confer a right to obtain a copy of the report. Whether the prisoner may do so is therefore a question committed to the discretion of the Commission, just as Rule 32(c)(3)(E) commits that decision to the discretion of the sentencing court. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843-844 (1984). From the outset, the Parole Commission has implemented the "reasonable access" requirement by allowing the prisoner to read the presentence report but not to receive a copy of it (see pages 5-6, *supra;* 28 C.F.R. 2.55), and since 1979, the Commission's regulations have expressly pro-

vided that a prisoner must obtain a copy of his presentence report from the sentencing court. 28 C.F.R. 2.56(b), as added by 44 Fed. Reg. 26552 (1979). The effect of this policy has been for the Parole Commission to defer to the judgment of the sentencing court as to whether the prisoner will receive a copy of the report.

The Commission has express authority under 18 U.S.C. 4203(a) to promulgate regulations for the implementation of its statutory powers, and those regulations must be sustained unless they are arbitrary and capricious. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 844; *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983); 5 U.S.C. 706(2)(A) and (C). The Commission's decision to follow the approach adopted by Congress and this Court for the very same documents clearly was not arbitrary and capricious. Indeed, that decision is affirmatively supported by another feature of 18 U.S.C. 4208(b), which exempts from disclosure under the statutory "reasonable access" provision any information that falls into one of three categories that directly parallel the categories of information that may be withheld from the defendant under Rule 32(c)(3)(A). The legislative history of the Parole Act shows that this parallel to Rule 32(c) was deliberate. See H.R. Conf. Rep. 94-838, 94th Cong., 2d Sess. 29 (1976); S. Rep. 94-648, 94th Cong., 2d Sess. 29 (1976); 121 Cong. Rec. 15705 (1975) (remarks of Rep. Drinan). It accordingly was entirely reasonable for the Commission likewise to follow Rule 32(c) and its implementation by the courts with respect to another aspect of disclosure—the release of a copy of the presentence report. Just as the FOIA cannot be used to circumvent the restrictions on release of a copy of a presentence report under Rule 32(c)(3)(E), it cannot be used to circumvent the identical limitations under the administrative access provisions in 18 U.S.C. 4208(b) and implementing regulations. *Renegotiation Bd.* v. *Bannercraft Co.*, 415 U.S. at 24.[11]

[11] For the same reason, the court of appeals erred in holding (App., *infra*, 12a n.7) that Rule 32(c) and 18 U.S.C. 4208(b) constitute a "waiver" of the privilege against release of presentence reports. Those provisions furnish only a limited right of disclosure on those occasions that Congress determined gave rise to a special need on the part of the subject of a presentence report to read it. They do not compel the disclosure of the contents of the report even to the defendant or prisoner in other circumstances. *A fortiori* they do not "waive" the Commission's right to withhold a copy of the report, which is what respondents seek in these suits under the FOIA.

In addition, and contrary to the court of appeals' suggestion (App., *infra*, 13a-14a), it is clear that factual material is protected by Exemption 5 where, as here, that material would be privileged in civil discovery. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 800 n.17.



d. The court of appeals also erred in failing to recognize that, in view of Rule 32(c)(3)(E) and 18 U.S.C. 4208(b), presentence reports may also be withheld under Exemption 3 of the FOIA. Exemption 3 applies to matters that are "specifically exempted from disclosure by statute" if the statute, inter alia, "refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3)(B). *CIA* v. *Sims*, 471 U.S. 159, 167-168 (1985). Rule 32(c)(3)(E) expressly refers to presentence reports and authorizes the withholding of a *copy* from the subject of the report. Similarly, 18 U.S.C. 4208(b) addresses disclosure of "a report or other document" to be relied upon by the Commission. The term "report" obviously refers to the presentence report, which the Commission is required by 18 U.S.C. 4207(3) to consider and which ordinarily is the most important source of information available to the Commission. Against the background of the parallel provisions of Rule 32(c), and as construed and applied by the Commission, 18 U.S.C. 4208(b) likewise grants the prisoner only a limited right of access to his presentence report and authorizes the Commission to withhold a *copy* of the report from him. Rule 32(c) and 18 U.S.C. 4208(b) of course must also embody the broader premise that the presentence report may be withheld from the public at

large. But whatever may be the application of Exemption 3 to a FOIA request by a third party, Rule 32(c)(3)(E) and 18 U.S.C. 4208(b) qualify as Exemption 3 statutes that permit the withholding of a copy of the presentence report from the subject of the report. For this reason, even if the court of appeals were correct that the privilege against disclosure of presentence reports does not permit a copy of the report to be withheld from the subject under Exemption 5, the court of appeals erred in holding (App., *infra*, 7a-9a) that the Commission was without authority to withhold a copy of the report from the prisoner under Exemption 3. But see *Crooker* v. *Parole Comm'n*, 760 F.2d at 2-3.

2.a. The ruling by the court of appeals in this case squarely conflicts with that of the District of Columbia Circuit in *Durns* v. *Bureau of Prisons*, which sustained the withholding of presentence reports under Exemption 5.[12] The question of the availability of presentence reports under the FOIA is also currently pending before two other courts of appeals. *Morgan* v. *Miller*, No. 86-5501 (3d Cir.) (to be argued Feb. 24, 1987); *Lindsey* v. *Bureau of Prisons*, remanded, 469 U.S. 1082 (1984), on remand, No. 86-5612 (11th Cir.); and *Scott* v. *Parole Comm'n*, No. 83-8805 (11th Cir.). We have been informed by the Parole Commission and Bureau of Prisons that more than ten additional cases are pending in the district courts, and that each agency receives an average of ten FOIA requests daily for documents that include the presentence report. The Parole Commission, Bureau of Prisons, district courts, probation officers, and federal prisoners should be given a clear answer to this frequently recurring question.

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[12] The requesters' petition for rehearing en banc in *Durns* was denied on December 23, 1986, by a 6-5 vote. *Durns* v. *Bureau of Prisons*, No. 85-5704.



b. Review also is warranted because the decision below compromises the confidentiality of presentence reports by requiring the release of copies notwithstanding the determinations by the sentencing courts and the Parole Commission to withhold them. The Commission unanimously reaffirmed its policy on August 9, 1985, by rejecting a petition for rulemaking filed by the Public Citizen Litigation Group, which proposed that the Commission order the release of copies of presentence reports to prisoners and subjects of the reports. App., *infra*, 23a-34a.

By letter dated June 17, 1985 (App., *infra*, 23a-27a), the Chief of the Division of Probation of the Administrative Office of the United States Courts submitted comments opposing the Public Citizen proposal. The letter stated that "it is the position of the Probation Committee of the Judicial Conference of the United States, as well as the Probation Division of the Administrative Office of the U.S. Courts, that permitting a defendant to keep a copy of his presentence report could likely impede the ability of U.S. probation officers to gather information and protect their sources" (*id.* at 25a). The letter explained that sources of information are informed that although a presentence report will be made available to the defendant to read, broader disclosure will not be made without the court's permission (*ibid.*). It then continued (*id.* at 25a, 27a):

> Were a defendant permitted to retain a copy of his report, * * * there would be no way to effectively prohibit further disclosure of the information to third parties. This possibility is far more dangerous to a source of information than is the possiblity of the defendant revealing his recollection of what he read in the report prior to sentencing. * * *
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> * * * * *
>
> Sources would have to be advised that a defendant would actually control the dissemination of informa-

tion in the report. This realization would be of concern to all sources, particularly state and local law enforcement agencies, which, understandably, might have more confidence in the measured discretion of the court than the whims of the defendant.

The court of appeals in this case completely disregarded this considered judgment of the officials who are responsible for the preparation of presentence reports and the courts that rely on them—a judgment to which the Parole Commission recently and unanimously deferred by declining to alter its longstanding policy barring the furnishing of copies of presentence reports to prisoners and other subjects of the reports. Review by this Court is therefore clearly warranted.

**CONCLUSON**

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1987

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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C.A. No. 85-2649
D.C. No. CV 85-00084 GLO-RME

KENNETH MICHAEL JULIAN, PLAINTIFF-APPELLEE,

*v.*

UNITED STATES DEPARTMENT OF JUSTICE,
DEFENDANT-APPELLANT.

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On Appeal From the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding

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C.A. No. 85-2751
D.C. No. C84-7893 TEH

MARGARET J. WALLACE, PLAINTIFF-APPELLEE,

*v.*

UNITED STATES PAROLE COMMISSION, AND
CHARLES TURNBO, WARDEN, F.C.I.,
PLEASANTON, CA, DEFENDANTS-APPELLANTS.

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On Appeal From the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

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Argued and Submitted September 11, 1986
San Francisco, California

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[Filed Dec. 30, 1986]

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**OPINION**

Before: WALLACE, ALARCON AND BEEZER, Circuit Judges

BEEZER, Circuit Judge:

Kenneth Michael Julian and Margaret J. Wallace requested copies of their presentence investigation reports under the Freedom of Information Act, 5 U.S.C. § 552, et seq. In separate summary judgment motions Julian and Wallace obtained orders requiring release of the reports. The government has appealed both judgments and the cases have been consolidated. We affirm.

I

On November 1, 1984, Wallace, who was at that time incarcerated, made a request under the Freedom Of Information Act (FOIA) for disclosure of all records pertaining to her in possession of the United States Parole Commission. On March 25, 1985, the Commission sent Wallace all of the relevant documents she had requested except for her presentence investigation report. Wallace filed suit seeking a copy of this report and on September 6, 1985, Judge Henderson ordered the presentence report released.

Julian, who is currently incarcerated, requested a copy of his presentence investigation report on October 17, 1984. This request was denied, prompting Julian to appeal to the Department of Justice, Office of Information and Privacy, which refused his request. Julian filed suit on January 30, 1985. On August 5, 1985, Judge Bilby granted Julian's motion for summary judgment and held that there was no basis to withhold the presentence investigation report.

II

The probation service of a district court compiles presentence investigation reports after a criminal defendant has been found guilty. The report contains detailed



factual information concerning the criminal record and background of the defendant. The report includes inter alia: 1) the defendant's official arrest and conviction record; 2) an official version of the offense in question obtained from the United States Attorney; 3) information concerning harm or loss suffered by the victim of the crime; 4) information on the defendant's contacts with the military, schools, banks, and credit bureaus; 5) summaries of interviews with social service agencies, employers, family and friends; and 6) clinical evaluations of the defendants' physical and mental health. The report concludes with the probation officer's sentencing recommendation. Fennell and Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports In Federal Courts*, 93 Harv. L. Rev. 1615, 1623 (1980).

The presentence report serves three purposes. The district court considers the report while formulating a sentencing decision. Second, if the convicted defendant is incarcerated, the report accompanies him to the correctional institution, where the Bureau of Prisons utilizes the contents of the report to classify the prisoner for the facility and to determine an appropriate treatment program. There is no statutory directive that the Probation Service furnish a copy of the report to the Bureau of Prisons, but it does so. Finally, the Parole Commission considers the report when it makes its parole eligibility determination.

The convicted defendant has several opportunities to read his presentence investigation report. Under Federal Rule of Criminal Procedure 32(c)(3), the convicted defendant and his attorney may examine all or certain portions of the report a reasonable time before sentencing. Rule 32(c)(3) states in pertinent part,

> (A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclu-

> sive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

Judges must provide an oral or written summary of any exempted information which they rely on in sentencing decisions and provide the defendant or his counsel an opportunity to comment on the summary. Fed. R. Crim. P. 32(c)(3)(B). The convicted defendant may not keep a copy of the report. Fed. R. Crim. P. 32(c)(3)(E). However, he may take extensive or verbatim notes from the report if he so chooses. Fennell and Hall, *supra* at 1646-47.

The convicted defendant has a second opportunity to view the report after he has been incarcerated and before his parole hearing. The Parole Commission and Reorganization Act of 1976, 18 U.S.C. § 4201, et seq. (PCRA), dictates the procedures for disclosing the report at this stage. The disclosure procedures applicable during the parole eligibility process mirror the procedures applicable during sentencing. 18 U.S.C. § 4208(b) provides in part:

> (b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination.

The statute identifies certain types of information which shall not be revealed to the convicted defendant except in summary form. These exempted items are identical to



those listed in Rule 32(c)(3).[1] A prisoner may obtain a copy of his presentence report during the parole hearing process, but only if the sentencing court which prepared the report consents. 28 C.F.R. § 2.56(b) (1985).

The government contends that presentence investigation reports are exempt from disclosure under FOIA provisions 5 U.S.C. § 552(b)(3) (hereinafter "Exemption 3") and 5 U.S.C. § 552(b)(5) (hereinafter "Exemption 5"). Alternatively, the government argues that FOIA is displaced by the special statutory procedures for obtaining presentence investigation reports set forth in Fed. R. Crim. P. 32(c)(3) and 18 U.S.C. § 4208. The district courts rejected these claims. Because this case involves questions of law, we review de novo. *United States v. McConney*, 728 F.2d 1195, 1200-01 (9th Cir.), *cert. denied*,, 469 U.S. 824 (1984).

## III

Presentence investigation reports are "agency records" when they are in the possession of the Parole Commission. *Fendler v. United States Parole Commission*, 774 F.2d 975, 977 (9th Cir. 1985); *Berry v. Department of Justice*, 733 F.2d 1343, 1349 (9th Cir. 1984). The government has not argued to the contrary in this case.[2] Consequently,

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[1] 18 U.S.C. § 4208(c) provides that "subparagraph (2) of subsection (b) shall not apply to—(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program; (2) any document which reveals sources of information obtained upon a promise of confidentiality; or (3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person."

[2] Until recently the government asserted that presentence reports are not agency records since they are initially prepared by courts, which are not viewed as agencies under 5 U.S.C. § 551(1)(B). We rejected this argument in *Berry v. Department of Justice*, 733 F.2d 1343, 1349 (9th Cir. 1984) (concluding that "court-generated documents

the Commission must disclose presentence reports to prisoners unless it can demonstrate that they fall within one of FOIA's nine enumerated exemptions. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 793-94 (1984). FOIA is to be liberally construed in favor of disclosure and its exemptions narrowly construed. *FBI v. Abramson*, 456 U.S. 615, 630-31 (1982) (citing *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

We are required to decide whether FOIA provides a *per se* exemption for withholding an entire presentence report when it is requested by the subject of the report. There is no doubt that portions of the report may be withheld. Both Rule 32(c)(3) and PCRA authorize the withholding of certain classes of information which appear in the presentence report. The probation officer's sentencing recommendation, diagnostic opinions which might disrupt the prisoner's rehabilitation if disclosed, and information obtained upon a promise of confidentiality may all be withheld pursuant to Rule 32(c)(3) and PCRA. FOIA does not override these provisions. In fact, it ensures their vitality.[3] However, FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C.

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are agency records if they are 1) in the possession of an agency and 2) prepared substantially to be relied upon in agency decisionmaking"). The First Circuit reached the opposite conclusion in *Crooker v. United States Parole Commission*, 703 F.2d 1 (1st Cir.), *vacated and remanded*, 469 U.S. 926 (1984). The government abandoned its contention that presentence reports held by the Parole Commission are not agency records in the Solicitor General's certiorari petition [*sic*] in *Crooker*.

[3] FOIA Exemption 3 allows the withholding of "matters that are specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3).



§ 552(b). Thus, the Parole Commission has a duty under FOIA to release any nonexempt, segregable portions of a presentence investigation report to the requesting party. The burden is on the Commission to justify nondisclosure. *FBI v. Abramson*, 456 U.S. 615, 626 (1982); *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Lykins v. United States Department of Justice*, 725 F.2d 1455, 1462-63 (D.C. Cir. 1984).

We conclude that neither Exemption 3 nor Exemption 5 provides a blanket exemption for presentence investigation reports. We recognize that the process of segregating nonexempt information from exempt information, and furnishing the nonexempt data to prisoners may be time consuming and expensive, but we are bound by the express language of 5 U.S.C. § 552(b). We expressly limit our holding to FOIA requests made by the subject of the presentence investigation report. FOIA exemptions which are inapplicable in this context may be applicable to third party requests for presentence reports. *See infra* n.4.

### A. *Exemption 3*

The statutory framework of FOIA requires the disclosure of agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in 5 U.S.C. § 552(b); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 793-94 (1984). Pursuant to Exemption 3, records may be withheld from disclosure that are

> [S]pecifically exempted from disclosure by statute (other than section 552(b) of this title) provided that such statute (A) requires that the matters be withheld from [the] public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). The government argues that Fed. R. Crim. P. 32(c)(3) and PCRA § 4208(c) specifically exempt presentence investigation reports from disclosure.

Neither Rule 32(c)(3) nor section 4208 of the PCRA establish complete exemptions. Each provision requires that presentence reports be disclosed to convicted defendants. In fact, Rule 32 was amended in 1983 to require disclosure to the defendant and his attorney even when they fail to request disclosure. This change in Rule 32 was prompted by findings that the disclosure of presentence reports was insufficient under the pre-1983 version of the rule to ensure accuracy of sentencing information. Fed. R. Crim. P. 32 advisory committee note. Thus, the provisions are exempting statutes only in the sense that they identify subclasses of information within the entire report that may be withheld.

*Berry v. Department of Justice*, 733 F.2d 1343 (9th Cir. 1984), was primarily concerned with the issue of whether presentence reports were agency records. In *Berry* we also considered the scope of Exemption 3 in response to the government's claim that dissemination of presentence reports would improperly intrude on the prisoner's right to privacy and undermine the government's effort to rehabilitate prisoners.[4] We found that PCRA was designed to maintain the confidentiality of specific portions

[4] The government hypothesized in *Berry* and in the case at bar that if presentence reports are subject to disclosure under FOIA, there will be an avalanche of requests by third parties seeking prisoners' reports, who under FOIA will have just as much right to copies of the reports as the subjects of the reports themselves. Initially, FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which exempts the disclosure of records "which would constitute a clearly unwarranted invasion of personal privacy" may provide an exemption for requests by third parties. A presentence report typically contains highly personal data and its disclosure to third parties could constitute an unwarranted invasion of the subject's privacy. The exemption is inapplicable when the FOIA request is made by the subject of the report. Moreover, despite the government's forecast of doom, history has shown that third party requests for presentence reports are uncommon. *Berry*, 733 F.2d at 1352.



of presentence reports and was therefore a withholding statute under Exemption 3. *Id.* at 1354. However, we concluded only that "*potentially harmful parts* of the presentence report and Report on Sentenced Offender will not be disclosed under the FOIA." *Id.* (emphasis added). The clear implication of our holding in *Berry* was that Exemption 3 was not a valid basis for a *per se* exemption for presentence reports, but only allowed the withholding of those specific types of information expressly identified in section 4208(c) of PCRA.

Accordingly, we conclude that Exemption 3 permits withholding the probation officer's sentencing recommendation, diagnostic opinions which might disrupt the inmate's rehabilitation if disclosed, and information obtained on a promise of confidentiality and any other information which, if disclosed, might result in harm to any person. If there is data contained in the report which falls within the purview of section 4208(c), it may be withheld pursuant to Exemption 3. However, the Commission has a duty to supply the FOIA applicant "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). A presentence report containing none of the items specified in section 4208(c) should be disclosed in its entirety. The government bears the burden of justifying nondisclosure of any withheld records or segments of records. *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Lykins v. United States Department of Justice*, 725 F.2d 1455, 1462-63 (D.C. Cir. 1984).

**B.** ***Exemption 5***

Title 5, United States Code, section 552(b)(5) exempts from FOIA disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the

agency." The government contends that presentence investigation reports are exempt under this provision.

On its face, Exemption 5 could encompass virtually everything an agency reduces to writing. Note, *The Freedom of Information Act and The Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1048 (1973). The provision has been construed narrowly to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132, 149 (1975). Thus, to invoke the protection of Exemption 5 the government must identify a privilege which it "enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975).

The Court of Appeals for the District of Columbia recently concluded that presentence reports fell within the purview of Exemption 5. *Durns v. Bureau of Prisons*, No. 85-5704, slip op. at 3 (D.C. Cir. Sept. 12, 1986). Our analysis leads us to an opposite conclusion.[5]

The government has failed to identify an existing statutory or common law privilege that exempts presentence reports from discovery. The government apparently claims that section 4208(c) of PCRA and Rule 32(c)(3) create such a privilege or, in the alternative, that such a

[5] The Court of Appeals for the District of Columbia found two recent Supreme Court cases addressing the scope of Exemption 5 persuasive. In *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984) the Court held that confidential statements obtained during an Air Force investigation of an airplane crash were protected from disclosure under Exemption 5. Such statements are privileged from discovery under the well-established rule of *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963). Similarly, in *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983), the Supreme Court concluded that Exemption 5 encompasses the attorney work-product rule. In both cases the Supreme Court applied Exemption 5 only after identifying a well recognized privilege. We do not find an established privilege in this case.



privilege may be inferred from a line of criminal cases where defendants requested presentence reports of codefendants to be used for impeachment purposes.

Rule 32 and PCRA do not create a civil discovery privilege. Both provisions mandate the disclosure of presentence reports to the subject of the report to ensure the report's accuracy. Each provision exempts a narrow class of information. However, these narrow exemptions do not create a blanket privilege for the entire report.

The government claims that a line of criminal cases creates a common law discovery privilege which justifies withholding presentence reports from the subject of the report. These cases hold that when a defendant requests a copy of a witness's presentence report for the purpose of impeaching the witness, the report will be disclosed only if it is necessary to meet the ends of justice.[6] These cases are inapposite when the party requesting the presentence report is the *subject* of the report. In the seminal decision on this subject, the Fourth Circuit stated

> Rule 32(c)(3), F.R.Cr.P., relates to the disclosure of presentence reports, and it it applicable to reports made by the Bureau of Prisons under 18 U.S.C. § 4208(b). Rule 32(c)(3)(E). *In general, the rule provides for the disclosure of such reports to a defendant who is the subject of the report, or his counsel, except for certain information and recommendations that may be withheld. The rule is silent about disclosure to anyone else.* We are in accord with the construction

[6] *See United States v. Anderson*, 724 F.2d 596 (7th Cir. 1984); *United States v. Charmer Indus., Inc.*, 711 F.2d 1164 (2d Cir. 1983); *United States v. Martinello*, 556 F.2d 1215 (5th Cir. 1977); *United States v. Cyphers*, 553 F.2d 1064 (7th Cir.), *cert. denied*, 434 U.S. 843 (1977); *United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976); *United States v. Figurski*, 545 F.2d 389 (4th Cir. 1976); *United States v. Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990 (1974).

placed on the rule in *Hancock Brothers, Inc. v. Jones*, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968): "information contained in a presentence report should not be disclosed to third parties unless lifting confidentiality is required to meet the ends of justice."

*United States v. Figurski*, 545 F.2d 389, 391 (4th Cir. 1976) (emphasis added). *See also* Fennell and Hall, *supra*, at 1683-84. The *Figurski* court recognized that Rule 32 and section 4208 require the disclosure of presentence reports to the subject of the report but that these provisions offer no guidance governing the disclosure of reports to third parties. Accordingly, the Fourth Circuit fashioned a different rule concerning disclosure requests made by third parties. However, the Fourth Circuit refused to tamper with the standards controlling disclosure to the subject of the report. *Figurski* and its progeny do not create a privilege which justifies withholding presentence reports when a FOIA request is made by the subject of the report. *See also United States v. Charmer Industries, Inc.*, 711 F.2d 1164, 1172-73 (2d Cir. 1983). In fact, *Figurski* disavows this result.[7]

[7] Even if the government could identify a common law or statutory privilege, it has waived its right to assert that privilege. Rule 32 and section 4208 of PCRA constitute a Congressional mandate which waives the government's privilege to withhold presentence reports from the subject of the report. The mandate is grounded in Congress' belief that convicted defendants must have an opportunity to read their presentence reports in order to ensure the accuracy of the information contained therein. The government asserts that there can be no waiver because convicted defendants, who are permitted to read their reports, are not allowed to copy them. This argument is meritless. In *Berry* we stated that "FOIA speaks in terms of disclosure and nondisclosure. It does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents." *Berry*, 733 F.2d at 1355 n.19. Thus, under FOIA, the government's required disclosure pursuant to Rule 32 and section 4208 of PCRA constitutes a waiver. It is irrelevant that the prisoners have never had the opportunity to copy their reports. *Cf. North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177 (8th Cir. 1978) (government waived right to claim privilege pursuant to Exemption 5 after voluntarily disclosing documents requested by North Dakota to the National Audobon Society in separate litigation).



A rule that presentence reports are exempt from disclosure would not further the objectives underlying Exemption 5. Exemption 5 was created to prevent the disruption of a free flow of ideas, opinions, advice and frank discussions within agencies concerning their policies and programs. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). In furtherance of this objective the courts have allowed the government to withhold memoranda containing advice, opinions, recommendations and subjective analysis. Note, *supra* at 1049. However, communications containing purely factual material are not typically within the purview of Exemption 5. In *EPA v. Mink*, the Supreme Court held that

> in the absence of a claim that disclosure would jeopardize state secrets, memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.

*EPA v. Mink*, 410 U.S. at 87-88 (citations omitted). *See also Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) ("Under this facet of exemption five, the courts have required disclosure of essentially factual material but allowed agencies to withhold documents which reveal their deliberative or policy-making processes").

A presentence investigation report is composed primarily of factual data about the prisoner. *See supra* p. 3. This essentially factual, nonprivileged material may not be withheld under Exemption 5. *United States v. Weber Air-*

*craft Corp.*, 465 U.S. at 800 n.17 (1984). Presentence reports exhibit none of the traditional indicia of privileged documents. They are not prepared with an expectation of secrecy.

In *EPA v. Mink*, the Supreme Court further observed that

> Exemption 5 . . . requires different treatment for materials reflecting deliberative or policy making processes on the one hand, and purely factual, investigative matters on the other.

*Mink*, 410 U.S. at 89. The process of compiling presentence reports is primarily factual and investigative. Disclosure of presentence reports will not chill deliberative or policy-making processes. The government contends that disclosing the reports will hamper its efforts in obtaining information from confidential sources. This claim is untenable. Both Rule 32 and section 4208 of PCRA authorize withholding "information obtained upon a promise of confidentiality." Moreover, FOIA Exemption 7 allows withholding records which would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). Thus, the government's resort to Exemption 5 for protection of data acquired from confidential sources is unnecessary.

We do not conclude that factual material can never qualify for protection under Exemption 5. We only hold that Exemption 5 does not create a *per se* exemption for presentence reports.

### C. *PCRA and Rule 32 Do Not Supersede FOIA*

The government's final claim is that section 4208 and Rule 32(c)(3)(E) constitute an alternative disclosure scheme and, as such, supersede FOIA.

We addressed a similar argument in *Long v. IRS*, 742 F.2d 1173 (9th Cir. 1984). In *Long*, the IRS argued that



the Internal Revenue Code sections government the confidentiality and disclosure of tax returns, 26 U.S.C. § 6103, preempted FOIA and provided the sole standard for disclosure of returns. We examined the text of section 6103 and its legislative history and found nothing to indicate that Congress intended section 6103 to operate independently of FOIA. Accordingly, we rejected the government's claim. *Long*, 742 F.2d at 1177.

Our analysis in *Long* requires us to find that FOIA is not implicitly supplanted by Rule 32 and section 4208 of PCRA. Nothing in the text of either provision or the legislative history of PCRA supports the claim that Congress intended to supersede FOIA.

The government relies on *Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985), to support its contention that Rule 32 and PCRA supersede FOIA. In *Ricchio* the Court of Appeals for the District of Columbia held that a doctoral candidate's request of transcripts of tape recordings of White House conversations involving former President Nixon was governed by the Presidential Records and Materials Preservation Act, 44 U.S.C. § 2111, rather than FOIA. Without passing on the wisdom of this decision we observe that a more compelling argument for displacing FOIA could be made in *Ricchio* than in the instant case. The Materials Preservation Act, unlike PCRA, is a comprehensive, detailed and carefully tailored provision governing disclosure of Presidential records. In addition, the legislative history of the MPA indicates that Congress intended it to displace FOIA. *Ricchio*, 773 F.2d at 1392 (quoting H.R. Rep. No. 1507, 93 Cong., 2d Sess. 1 (1974)). In contrast, the scheme prescribed by Rule 32 and section 4208 does not approximate the specificity or particularity required to displace FOIA. Thus, we find that *Ricchio* is inapposite.

The judgments of the district courts are AFFIRMED.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-85-084-GLO-RMB

KENNETH MICHAEL JULIAN, PLAINTIFF,

*v.*

UNITED STATES DEPARTMENT OF JUSTICE,
DEFENDANT.

[Filed Aug. 5, 1985]

**ORDER**

IT IS ORDERED that plaintiff's Motion for Summary Judgment is GRANTED and defendant's Motion for Summary Judgment is DENIED.

This Court has ascertained that it is the policy of the sentencing court (Eastern District of California) to disclose all of the presentence report, including the recommendation, to a defendant in a criminal action. Under those circumstances there is no basis to withhold the presentence report from the plaintiff's review.

DATED: August 5, 1985.

/s/ RICHARD M. BILBY
Richard M. Bilby
*United States District Judge*



**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 84-7893 TEH

MARGARET J. WALLACE, PLAINTIFF,

*v.*

UNITED STATES PAROLE COMMISSION,
AND CHARLES TURNBO, WARDEN, F.C.I., PLEASANTON, ET AL.,
DEFENDANTS.

[Filed Sept. 6, 1985]

**ORDER**

Plaintiff Margaret Wallace brings this action for the release of a copy of her presentence report under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Plaintiff was formerly a federal prisoner, having been paroled from the Federal Correctional Institution, Pleasanton, California on April 17, 1985. On November 1, 1984 she made a request to the Parole Commission under the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, for all of the Commission's records on her. On March 25, 1985 the Parole Commission acted on the plaintiff's disclosure request by sending her copies of all documents in the Commission's file except those available to her at her institution and except for her presentence report.

Plaintiff then filed this suit, and an order to show cause was issued by this Court on May 22, 1985. For the reasons stated below, we grant in part and deny in part petitioner's application. We hold that a copy of plaintiff's presentence report must be released to her, but that plaintiff's request for damages must be denied.

**DISCUSSION**

The FOIA provides that each government agency shall make available to the public requested information, except where it falls within an enumerated exemption. 5 U.S.C. § 552. The FOIA is to be liberally construed in favor of disclosure, and its exemptions narrowly construed. *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973), *cert. den.*, 415 U.S. 977 (1974).

The Ninth Circuit has determined that presentence reports requested from the U.S. Parole Commission are agency documents subject to disclosure under the FOIA because they are in the possession of an agency rather than the court and are prepared substantially for use in the decision making process of the agency. *Berry v. Dept. Of Justice*, 733 F.2d 1343 (9th Cir. 1984).

The government argues, however, that Rule 32(c) of the Federal Rules of Criminal Procedure, which governs disclosure of presentence reports prior to sentencing, and the disclosure provision of the Parole Commission and Reorganization Act, 18 U.S.C. § 4208, place presentence reports within exemptions three and five of the FOIA. 5 U.S.C. § 552(3) and (5). In the alternative, it argues that these two disclosure provisions together create a "special statutory access scheme" which bypasses the FOIA.

Specifically, the government points to 18 U.S.C. § 4208(b) which allows a prisoner to see his presentence report within 30 days prior to a parole determination proceeding; Rule 32(c)(A) which allows the prisoner to see his presentence report prior to sentencing; and Rule 32(c)(E) which leaves to the discretion of the court the decision whether to release copies of the presentence report at the time of senctencing. According to the government, these provisions mean that, under exemptions three and five, the prisoner may *see* his report but that the Parole Commission is not required to give him a copy of it.



The government's reliance on Rule 32(c) is misplaced. The *Berry* court rejected the notion that Rule 32(c) provides a basis for exempting presentence reports from disclosure after they are in the hands of the Parole Commission. The court concluded that once the reports have left the court, Rule 32(c) is no longer applicable. *Berry,* 733 F.2d at 1355 n.19. Under *Berry*, therefore, Rule 32(c) may not be relied on to place the presentence report within the statutory exemptions to the FOIA.

We now consider the government's argument that 18 U.S.C. § 4208 places the presentence report within exemptions three and five.

*Exemption Three*

Exemption three provides that the FOIA does not apply to matters that are "specifically exempted from disclosure by statute provided that such statute a) requires that the matters be withheld from the public in such a manner as to leave no discretion of [*sic*] the issue or b) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3). The statutory provision for access to the presentence report prior to parole hearing, 18 U.S.C. § 4208, is a withholding statute under exemption three in that it sets forth specific types of information which may not be disclosed to the prisoner where such revelation may prove harmful. However, only such material as falls within the enumerated categories under § 4208(c) can be withheld from the prisoner. Section 4208 thus provides no authority for the parole commission to withhold the entire document under exemption three. *Berry,* 733 F. 2d at 1353-1354; *on remand,* ____ F. Supp. ____ (D. Az. May 9, 1985) (No. Civ. 82-2041 PHX CAM). As the government has not identified any portions of plaintiff's presentence report which fall into the categories set forth in § 4208, the

government may not withhold the entire presentence report or any part of it under exemption three.

*Exemption Five*

Under 5 U.S.C. § 552(b)(5), the government may withhold "interagency or intraagency memoranda or letters which would not be available by law to a party other than an agency in litigation with an agency."

The Supreme Court has noted that the purpose of exemption five is to allow an agency to withhold information which would not be discoverable by a private party in litigation, thereby preventing parties from utilizing the FOIA to obtain information that they could not otherwise obtain because of a legally established discovery privilege. *U.S. v. Weber Aircraft Corp.*, 104 S. Ct. 1488 (1984). Most courts have limited the scope of exemption five to protect from disclosure only those documents that reflect interagency or intraagency "give and take" during policy development. *Crooker v. U.S. Parole Commission*, 730 F.2d 1 (1st Cir. 1984) (citing cases). The *Crooker* court itself found that presentence reports would not likely fit within the rubric of exemption five. *Id.* at 9.[1]

The government cites neither controlling nor persuasive authority for its reliance on exemption five. The government claims there is a qualified privilege created by 18 U.S.C. § 4208 and Rule 32(c)(3). This is the same rationale used in the argument under exemption three. Although *Berry* does not deal with exemption five, its holding with regard to exemption three, discussed above, makes clear that only those types of materials enumerated in § 4208 may be withheld under exemption three. The FOIA exemptions were not intended to create new privileges for

[1] Although the *Berry* court disapproved *Crooker's* reasoning on the question of whether presentence reports are agency records, it neither approved nor disapproved that court's analysis of the FOIA exemptions.



civil discovery. *Kerr v. U.S. District Court*, 511 F.2d 192 (9th Cir. 1975). The government cannot claim that because exemption three authorizes limited withholding of information, a privilege is created as to the whole presentence report which would put it within exemption five.

In view of the principle of narrow construction of the exemptions to the FOIA, as stated above, the government has not adequately demonstrated that presentence reports are privileged and therefore subject to exemption five.

**SPECIAL STATUTORY ACCESS PROCEDURE**

As a final matter, there is no merit to the government's argument that 18 U.S.C. § 4208 and Rule 32(c) create a special statutory access scheme which bypasses the FOIA and should be construed as the sole standard governing release of presentence reports. For this proposition the government relies on *Zale Corp. v. Internal Revenue Service*, 481 F. Supp. 486 (D.D.C. 1979). The Ninth Circuit has expressly rejected the *Zale* principle as applied to the same IRS statutory disclosure scheme that *Zale* addressed. (26 U.S.C. 6103 (b)(2)). *Long v. Internal Revenue Service*, 742 F.2d 1173 (1984). *Zale* cannot therefore be applied in this Circuit as a general principle for the construction of the FOIA in relation to other statutes affecting disclosure of information.

**CONCLUSION**

We conclude that the plaintiff's presentence report is not exempt from the FOIA under exemption three or five, nor is access to it solely controlled by 18 U.S.C. § 4208(b) and Rule 32(c)(3), Fed. R. Crim. P. As the government has made no showing that certain parts of the presentence report should be withheld pursuant to exemption three, a copy of plaintiff's complete report must be released to her.

Because this matter can be resolved under the FOIA, we need not reach the issue of whether disclosure would be authorized under the Privacy Act, 5 U.S.C. 552(a). As for plaintiff's claim for damages, presumably brought under the Privacy Act, there is no evidence in the record before us of intentional or willful action on the part of the Parole Commission 5 U.S.C. 552(a)(g)(4), and therefore damages are inappropriate.

Having carefully considered the papers of both parties, we HEREBY ORDER that the Parole Commission provide plaintiff a complete copy of her presentence report within thirty (30) days of the date of this Order.

SO ORDERED.

DATED: September 6, 1985

/s/ THELTON E. HENDERSON
Thelton E. Henderson
*United States District Judge*



**APPENDIX D**

U.S. Department of Justice
United States Parole Commission
5550 Friendship Blvd.
Chevy Chase, Maryland 20815

August 9, 1985

Eric R. Glitzenstein, Esquire
Alan B. Morrison, Esquire
Public Citizen Litigation Group
Suite 700
2000 P Street, N. W.
Washington, D. C. 20036

Dear Messrs. Glitzenstein and Morrison:

The Commission has voted unanimously not to engage in rulemaking as requested in your petition dated March 26, 1985. The Commission indicated their agreement with the reasons for denial expressed in the analysis prepared by the General Counsel. See the enclosed memorandum dated April 17, 1985. Also before the Commission was a letter to Chairman Baer from the Chief of the Division of Probation, Administrative Office of the United States Courts, dated June 17, 1985, which recommended denial of the petition. Together with your petition, these were the documents that were considered by the Commission in reaching its decision.

Sincerely,
/s/ JOSEPH A. BARRY
Joseph A. Barry
General Counsel
U.S. Parole Commission

Enclosure

**APPENDIX E**

Administrative Office of the
United States Courts
Washington, D.C. 20544
June 17, 1985

Honorable Benjamin F. Baer
Chairman, United States
Parole Commission
Park Place Building
5550 Friendship Boulevard
Chevy Chase, Maryland 20815

Re: Petition for Rulemaking:
Disclosure of Presentence
Reports Under the Freedom
of Information Act

Dear Chairman Baer:

Pursuant to your memorandum of April 19, 1985, I provide remarks regarding the Petition for Rulemaking that will be before the Parole Commission in July 1985.

You have asked the Probation Division to comment on the Petition for Rulemaking submitted by the Public Citizen Litigation Group to the United States Parole Commission. The petition requests that the U.S. Parole Commission adopt a rule providing that, within 10 days after the Parole Commission receives a copy of a prisoner's presentence investigation report from the sentencing court, the Parole Commission furnish the prisoner with his or her own copy, to be retained by the prisoner. The General Counsel of the Parole Commission has recommended that the petition be denied.

I have reviewed the petition and the statement of General Counsel Joseph Barry and essentially, although I do not agree with all of the statements made in the General



Counsel's memorandum regarding the denial of this petition, I certainly agree with the conclusion. As noted in Mr. Barry's memorandum, it is the position of the Probation Committee of the Judicial Conference of the United States, as well as the Probation Division of the Administrative Office of the U.S. Courts, that permitting a defendant to keep a copy of his presentence report could likely impede the ability of U.S. probation officers to gather information and protect their sources.

Presentence investigation reports contain an abundance of personal and social information about the defendant, his family and associates, and other innocent persons. Probation officers do now and always have assured sources of such information that the information they give will be made available to the courts, but only shown to the Government, the defendant and his counsel for reading. Otherwise, they are told, the information will be disclosed only with the court's permission. Thus, these sources of information have always believed that the information they give will be subject to limited confidentiality, with broader access to the information controlled by a United States district judge. Normally, this level of confidentiality does not require the specific protections of F.R.Cr.P.32(c)(3)(A), so that the Government and the defendant normally have access to most of the information at sentencing.

Were a defendant permitted to retain a copy of his report, however, there would be no way to effectively prohibit further disclosure of the information to third parties. This possibility is far more dangerous to a source of information than is the possibility of the defendant revealing his recollection of what he read in the report prior to sentencing. Far more mischief is possible if a defendant has all of the sources and all of the information from the presentence report at his fingertips.

This concept was well understood by the drafters of F.R.Cr.P.32(c)(3)(E). That section specifically provides that, unless the court in its discretion determines other-

wise, the defendant must return his copy of the presentence report. The rule embodies the concern of the courts that the defendant's retention of the presentence report is normally inimical to the interests of obtaining full and accurate information prior to sentencing. So, F.R.Cr.P.32 strikes a balance. In the interests of due process, the defendant is permitted to read the presentence report to check its accuracy and to otherwise prepare for allocution. In the interest of information gathering, the defendant is not, under normal circumstances, permitted to retain copies of his presentence report. If the Parole Commission adopted the proposed petition, a district court judge could lawfully deny the defendant permission to retain a copy of his presentence report, but the defendant could then nullify the court's decision and the policies embodied in F.R.Cr.P.32(c)(3)(E) by requesting the report from the U.S. Parole Commission. The adoption of this petition would, in effect, permit the Parole Commission to usurp the authority granted to district judges in F.R.Cr.P.32(c)(3)(E) by granting retention denied by district court judges.

Among the sources who would be concerned if defendants were permitted to retain their presentence reports are state, county and municipal agencies. These are among the primary sources of information for presentence reports in 93 of the 94 district courts (excluding the District of Columbia). The situation in the District of Columbia is somewhat unique in that probation officers in the District of Columbia are not as reliant upon other Government entities for their sources of presentence information. Indeed, in all of the U.S. district courts, save in the District of Columbia, probation officers utilize a release form and advise agencies, as well as other contributing parties, that the information being collected for the presentence reports will be utilized only with the court's permission. To adopt the policy urged in the request for rulemaking would require the abandonment of this form as well as the practice of assuring sources that, with the exception of providing an opportunity to read the report, the dissemination of the report is controlled by the court. Sources would have to be advised that a defendant would actually control the dissemination of information in the report. This realization would be of concern to all sources, particularly state and local law enforcement agencies, which, understandably, might have more confidence in the measured discretion of the court than the whims of the defendant.



Of course, the purpose in preserving sources of information has always been to facilitate the gathering of complete and accurate information for sentencing. Also, we understand that complete and accurate presentence reports are useful to the Parole Commission. The court in *Berry v. Department of Justice,* 733 F.2d 1343, 1351 (9th Cir. 1984), has described these documents as "routinely relied upon in the parole decision-making process." The courts have regularly held that limited disclosure of presentence reports was necessary to their preparation. *See United States v. Charmer Industries, Inc.,* 711 F.2d 1164 (2d Cir. 1983), and cases cited therein. The drafters of F.R.Cr.P.32(c)(3)(E) believed such limited disclosure necessary. The Parole Commission, therefore, in our opinion, has a distinct interest in preserving the limited disclosure of presentence reports embodied in F.R.Cr. P.32. Therefore, for these reasons, we concur with the U.S. Parole Commission's recommendation that the Commission not adopt the proposed rule.

Sincerely,

/s/ DONALD L. CHAMLEE

Donald L. Chamlee

cc: Honorable Gerald Bard Tjoflat

**APPENDIX F**

Date: April 17, 1985

Subject: Agenda Item: Rulemaking Petition Concerning Disclosure of Presentence Investigation Reports.

From: Joseph A Barry, General Counsel

By: Michael A. Stover, Attorney

To: Benjamin F. Baer
Chairman
U.S. Parole Commission

Attached is a petition to initiate rulemaking under the Administrative Procedures Act, 5 U.S.C. Sec. 553(e). Under that law, Federal agencies, including the U.S. Parole Commission, are obliged to receive and consider petitions from the general public seeking the adoption of particular rules and policies. If the agency declines to grant the petition, a brief statement of reasons is generally given to the petitioner. Accordingly, the attached petition should be made an agenda item for the Commission's discussion, both because the law requires its consideration, and because the topic (disclosure of presentence investigation reports) is one which is currently producing a good deal of litigation.

In brief, the petition requests that the Parole Commission adopt a rule providing that, within ten days after the Parole Commission receives a copy of a prisoner's presentence report from a sentencing court, the Parole Commission shall furnish the prisoner with his or her own copy, which may be retained. The petition is correct in telling the Commission that it has the legal authority to dispose of its copies of presentence investigation reports in any way the Parole Commission deems appropriate. This



is because the U.S. Solicitor General, last Fall, decided that the Department of Justice would henceforth take the position that presentence investigation reports are to be considered "agency records" for the purposes of the Freedom of Information Act. This means that, although the original of the report remains a court document, the copy which is sent to the Commission is an "agency record" over which the Commission has plenary control.

Moreover, our statute requires that the Commission give "reasonable access" to these reports. 18 U.S.C. Sec. 4208(b). The Commission is free to interpret "reasonable access" as it deems appropriate, although other statutes dealing with the presentence investigation report certainly have a bearing on the proper interpretation of Section 4208(b). Thus, the petition asks the Commission to promulgate a rule which it could legally do. Whether it would be wise to do so is another matter.

We offer the following comments concerning this petition. The comments are given from a strictly legal point of view, and are based on the assumption that the Parole Commission, as a policy matter, still believes that permitting prisioners to retain copies of their presentence investigation reports would be sound correctional policy insofar as the Parole Commission's interests in the matter are concerned.

The immediate practical consequence of the Parole Commission's adopting the rule proposed in the petition would beyond any doubt be that a goodly number of the U.S. District Courts would take offense at the rule, and would rightly perceive it as a unilateral attempt to set system-wide policy with respect to disclosure of the report. It should be noted that, in making the above decision, the Solicitor General made it clear that the Parole Commission was not expected to take unilateral action, but should

work with the Administrative Office and the Federal court system to achieve a coordinated and harmonious approach to the problem.

It is the official position of the Probation Committee of the U.S. Judicial Conference, as well as the Administrative Office of the U.S. Courts (particularly the General Counsel and the Probation Service), that permitting defendants to keep copies of their presentence reports would impede the ability of U.S. Probation Officers to gather information and protect their sources.

The reasoning behind this assumption has never been set forth in any formal manner or committed to publication. However, we have been given ample evidence over the years (and quite recently) that the assumption is strongly held and widely shared among the U.S. Probation Officers in the field, as well as the U.S. District Judges who listen to the point of view expressed by the Probation Service. The fact that the U.S. District Court for the District of Columbia has pursued a different policy without notable adverse consequences in recent years does not seem to have persuaded other districts to follow suit, nor has it persuaded the Probation Committee and the Administative Office to revise their policy position.

Thus far, a harmonious approach has been achieved by the Parole Commission adopting the legal position that, although it has the authority to release copies of presentence reports, it is not legally obliged to do so, and chooses not to do so principally to avoid undermining the privileged status of presentence reports in sentencing proceedings under Rule 32, Federal Rules of Criminal Procedure. Under that rule, the courts are not obliged to permit defendants to retain copies of their reports. Indeed, the presumption in the rule is that reports will be returned after sentencing unless the court, in its discretion, permits otherwise. Thus, the presentence report is accorded a privileged status immediately prior to the commencement



of parole proceedings in each case. If the Commission adopted the policy proposed by this petition, such a policy would create an anomaly, in that a U.S. District Judge could exercise lawful authority to deny the defendant permission to retain a copy of the report, without having done anything improper, but the defendant could effectively nullify the judge's decision within a matter of days by obtaining a copy of the same report immediately after commencing service of a prison sentence imposed by the same judge.

Thus, the adoption of the proposed rule would have the Parole Commission effectively imposing its will upon the U.S. District Courts. Although it is possbile that the agency might, in some circumstances, wish to contemplate creating such a conflict in order to stand by fundamental principles of its paroling policy and statute, it is not, on the other hand, obliged to do so if it does not believe such fundamental principles are at stake. In our view, fundamental fairness is hardly at stake; even if we believe that no harm would be done by releasing copies of those reports, we cannot say that a prisoner gains much by getting to keep a copy of a report he is already able to read and take notes from.

There are a number of other reasons why the Commission might wish to refrain from imposing its views unilaterally upon the courts.

First, there is the practical consideration that many U.S. District Courts may react to such an undiplomatic move by simply refusing to send the Commission any more presentence investigation reports. During 1976, when the PCRA was first passed, a number of U.S. District Courts reacted by refusing to send the Parole Commission any presentence reports for a period of several months until the courts decided among themselves how to deal with the new situation of disclosure brought about by the Act. There are two U.S. District Courts which have never given

us copies of their original presentence reports, forcing the Commission to require the production of "post-sentence reports." This has never been a satisfactory alternative, because the Commission has not been in a position to ensure that all the information contained in the presentence report given to the sentencing judge has been included in the post-sentence report. At least one U.S. District Court affected by recent developments in presentence report disclosure litigation, through its Chief U.S. Probation Officer, has indicated that a refusal to supply presentence reports might follow if a situation developed whereby the Commission was obliged to give out copies to defendants.

We believe that the Commission has the legal basis necessary to persuade the U.S. Courts of Appeals that the Commission has a right to receive presentence reports, regardless of the type of disclosure which the Commission will make after it receives them. However, we are very reluctant to advise the Commission to embark upon such a course. Such litigation would be an enormous drain upon the resources of Commission headquarter's staff; it would also risk a severe disruption of our hearing dockets if hearings had to be postponed to await production of presentence reports.

Second, a factor suggesting caution would be respect for the legal authority of the district courts to deny retention of presentence reports. We agree with the Solicitor General that it would not be appropriate for the Commission to attempt to resolve differences of opinion as to correct policy by adopting a procedure which would reduce a U.S. District Court's exercise of its authority under Rule 32, F.R.Crim.P., to a meaningless gesture. Statutes should always be interpreted *in pari materia*, that is, as if they were meant to be a structural whole. See *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194 (1857).

Third, there is the possibility that, at least in some circumstances, the Probation Service may be correct that



disclosure of presentence reports would not serve sound correctional policy. The Parole Commission has a great deal of experience of its own, but so does the Probation Service. It would seem inappropriate to brush their views aside and take the unilateral step proposed in this petition. Just because the Commission views the matter the way it does does not mean that the Probation Service might not turn out to have same valid concerns.

For all of these reasons, we recommend that the Commission not adopt the proposal. We note that the Commisson recently changed its disclosure rules to permit reasonable access to a presentence report by a prisoner's representative, which had hitherto been a major practical reason why prisoners justified their requests to retain copies of their reports (so that the reports could be shown to their representatives). In the light of this development, we cannot agree with the petitoners that permitting inmates to keep their presentence reports would result in any major increase in the fairness of the system or the accuracy of the Commission's findings of fact. The more likely result would be a marked increase in litigation under 28 U.S.C. Sec. 2255 (in the sentencing courts) in which prisoners attempted to challenge the fairness of their presentence reports. The courts have not, so far, been at all sympathetic to such challenges. See *United States* v. *Stevenson*, 573 F.2d 1105 (9th Cir. 1978).

Thus, it cannot be said that the Parole Commission has abandoned any attempt to reach an accommodation with the courts. It should be noted that the above rule change was adopted only after every single Chief U.S. District Judge in the nation had been contacted about the proposal by letter from Director Norman Carlson through the Administrative Office of the U.S. District Courts. A number of courts actually expressed reservations about even this tentative a move toward greater disclosure, and a handful

even refused to consent to the additional disclosure at all. (This experience promises a poor reception for the much more radical change suggested by the petitioners.)

Attachment



## APPENDIX G

### RELEVANT STATUTORY PROVISIONS, RULE AND REGULATIONS

1. The Freedom of Information Act, 5 U.S.C. (& (Supp. III) 552, provides in relevant part:

**Public information; agency rules, opinions, orders, records, and proceedings**

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(4) * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

* * * * *

2. The Parole Commission and Reorganization Act of 1976, 18 U.S.C. 4201 *et seq.*, provides in relevant part:

* * * * *

**§ 4203. Powers and duties of the Commission**

(a) The Commission shall meet at least quarterly, and by majority vote shall—

(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

* * * * *

**§ 4205. Time of eligibility for release on parole**

* * * * *

(e) Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not in-



compatible with the public interest, their views and recommendation with respect to any matter within the jurisdiction of the Commission.

* * * * *

**§ 4207. Information considered**

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge;

(5)[1] a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim; and

(5)[1] reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

---

[1] So in original. There are two pars. designated (5).

**§ 4208. Parole determination proceeding; time**

(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole

determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

(c) Subparagraph (2) of subsection (b) shall not apply to—

(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the



exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

(d)(1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner many consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exlude attorneys as a class.

(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding.

(h) In any case in which release on parole is not granted, subsequent parole determinaton proceedings shall be held not less frequently than:

(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.

3. Rule 32(c) of the Federal Rules of Criminal Procedure provides:

* * * * *

(c) **Presentence Investigation.**

**(1) When Made.** The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

**(2) Report.** The presentence report shall contain—

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.



**(3) Disclosure.**

(A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and his counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the alle-

gation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

* * * * *

4. The Parole Commission regulations governing disclosure of documents to a prisoner provide (28 C.F.R. 2.55 and 2.56):

**§ 2.55 Disclosure of file prior to parole hearing.**

(a) *Processing disclosure requests.* At least 60 days prior to a hearing scheduled pursuant to 28 CFR 2.12 or 2.14 each prisoner shall be given notice of his right to request disclosure of the reports and other documents to be used by the Commission in making its determination.

(1) The Commission's file consists mainly of documents provided by the Bureau of Prisons. Therefore, disclosure of documents used by the Commission can normally be accomplished by disclosure of documents in a prisoner's institutional file. Requests for disclosure of a prisoner's institutional file will be handled under the Bureau of



Prison's disclosure regulations. The Bureau of Prisons has 15 days from date of receipt of a disclosure request to respond to that request.

(2) A prisoner may also request disclosure of documents used by the Commission which are contained in the Commission's regional office file but not in the prisoner's institutional file.

(3) Upon the prisoner's request, a representative shall be given access to the presentence investigation report reasonably in advance of the initial hearing, interim hearing, and a 15-year reconsideration hearing, pursuant and subject to the regulations of the U.S. Bureau of Prisons. Disclosure shall not be permitted with respect to confidential material withheld by the sentencing court under Rule 32(c)(3)(A), F.R.Crim.P.

(b) *Scope of disclosure.* The scope of disclosure under this section is limited to reports and other documents to be used by the Commission in making its determination. At statutory interim hearings conducted pursuant to 28 CFR 2.14 the Commission only considers information concerning significant developments or changes in the prisoner's status since the initial hearing or a prior interim hearing. Therefore, prehearing disclosure for interim hearings will be limited to such information.

(c) *Exemption to disclosure (18 U.S.C. 4208(c)).* A document may be withheld from disclosure to the extent it contains: (1) Diagnostic opinions which, if known to the prisoner, could lead to a serious disruption of his institutional program;

(2) Material which would reveal a source of information obtained upon a promise of confidentiality; or

(3) Any other information which, if disclosed, might result in harm, physical or otherwise to any person.

(d) *Summarizing nondisclosable documents.* If any document or portion of a document is found by the Com-

mission, the Bureau of Prisons or the originating agency to fall within an exemption to disclosure, the agency shall:

(1) Identify the material to be withheld; and

(2) State the exemption to disclosure under paragraph (c) of this section; and

(3) Provide the prisoner with a summary of the basic content of the material withheld with as much specificity as possible without revealing the nondisclosable information.

(e) *Waiver of disclosure.* When a timely request has been made for disclosure, if any document or summary of a document relevant to the parole determination has not been disclosed 30 days prior to the hearing, the prisoner shall be offered the opportunity to waive disclosure of such document without prejudice to his right to later review the document or a summary of the document. The examiner panel may disclose the document and proceed with the hearing so long as the prisoner waives his right to advance disclosure. If the prisoner chooses not to waive prehearing disclosure, the examiner panel shall continue the hearing to the next docket to permit disclosure. A continuance for disclosure should not be extended beyond the next hearing docket.

(f) *Late received documents.* If a document containing new and significant adverse information is received after a parole hearing but before all review and appellate procedures have been concluded, the prisoner shall be given a rehearing on the next docket. A copy of the document shall be forwarded to the institution for inclusion in the prisoner's institutional file. The Commission shall notify the prisoner of the new hearing and his right to request disclosure of the document pursuant to this section. If a late received document provides favorable information, merely restates already available information or provides insignificant information, the case will not be reopened for disclosure.



(g) *Reopened cases.* Whenever a case is reopened for a new hearing and there is a document the Commission intends to use in making its determination, a copy of the document shall be forwarded for inclusion in the prisoner's institutional file and the prisoner shall be informed of his right to request disclosure of the document pursuant to this section.

**§ 2.56 Disclosure of Parole Commission Regional Office File.**

(a) *Procedure.* Copies of disclosable records pertaining to a prisoner or parolee which are contained in the prisoner's regional office file may be obtained by that prisoner or parolee upon written request pursuant to this section. Such requests shall be answered as soon as possible in the order of their receipt. Other persons may obtain copies of such documents only upon proof of authorization from the prisoner or parolee concerned.

(b) *Scope of disclosure.* Disclosure under this section shall extend to Commission documents concerning the prisoner or parolee making the request. Documents which are contained in the regional file and which are prepared by agencies other than the Commission shall be referred to the appropriate agency for a response pursuant to its regulations, unless such document has previously been prepared for disclosure pursuant to § 2.55 or is fully disclosable on its face, or has been prepared by the Bureau of Prisons. A prisoner or parolee shall be directed to request records in his/her institutional Inmate Central File from the Bureau of Prisons. Any request for copies of court documents (including the presentence investigation report) must be directed to the appropriate court.

(c) *Exemptions to disclosure.* A document or segregable portion thereof may be withheld from disclosure to the extent it contains:

(1) Diagnostic opinions which if known to the prisoner could lead to a serious disruption of his institutional program;

(2) Material which would reveal a source of information obtained upon a promise of confidentiality; or

(3) Any other information, which if disclosed, might result in harm, physical or otherwise, to any person.

(d) *Specification of documents withheld.* Documents that are withheld pursuant to paragraph (c) of this section shall be identified for the requester together with the applicable exemption for withholding each document or portion thereof. In addition, the requester must be informed of his or her right to appeal any non-disclosure to the Office of Privacy and Information of the Department of Justice (Associate Attorney General).

(e) *Hearing record.* Upon request by the prisoner or parolee concerned, the Commission shall make available a copy of any verbatim record (e.g., tape recording) which it has retained of a hearing, pursuant to 18 U.S.C. 4208(f).

(f) *Costs.* In any case in which reproduction costs equal or exceed three dollars (based upon the fee schedule as set forth in the Department of Justice regulations at 28 CFR 16.47), prisoners will be notified that they will be required to reimburse the United States for such reproduction costs. The Regional Commissioner may require payment in advance of making a disclosure in circumstances where deemed necessary.

(g) *Relation to other provisions.* Disclosure under this section is authorized by 28 CFR 16.85, under which the Parole Commission is exempt from the record disclosure provisions of the Privacy Act of 1974, as well as from certain other provisions of that Act pursuant to 5 U.S.C. 552(a)(j)(2). Requests submitted under the Freedom of Information Act (FOIA) for requester's own records will be processed under this section. In no event will the Commission consider satisfaction of a request under this section,



the FOIA, or the Privacy Act of 1974, to be a prerequisite to an adequate parole hearing under 18 U.S.C. 4208 (for which disclosure is exclusively governed by § 2.55 of this part) or to exercise of a parole applicant's appeal rights under 18 U.S.C. 4215.

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# OPPOSITION

# BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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No. 86-1357

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UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Petitioners,

v.

KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE,

Respondents.

---

RESPONSE OF KENNETH MICHAEL JULIAN TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

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May 12, 1987

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Petitioners,

v.

KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE,

Respondents.

---

MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Presentence reports are prepared by court probation officers and are initially used by federal judges in making sentencing decisions. They contain a broad range of information about a defendant's background, recommend a sentence to the court, and suggest a treatment plan. See Fennell & Hall, Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts, 93 Harv. L. Rev. 1613, 1617 (1980). Prior to 1975, sentencing judges had complete discretion under the Federal Rules of Criminal Procedure to determine whether presentence reports would be shown to defendants. In 1975, however, Rule 32(c)(3) of the Fed. R. Crim. P. was amended by Congress to require that, prior to the imposition of sentence, prisoners or their attorneys must be permitted to see the full reports, except for three narrow categories of information, such as confidential sources. The rule was further amended in 1983 to provide that presentence reports must be disclosed to both prisoners and their attorneys. Id. at § 32(c)(3)(B).

Congress' 1975 amendment of Rule 32 coincided with its passage of the Parole Act. That statute directs probation officers to provide the Parole Commission with copies of presentence reports, and it requires the Commission to consider the reports in making parole determinations. 18 U.S.C. §§ 4205(e), 4207. Thus, the presentence report "plays a crucial role during parole determinations," and "serves as the primary source of information in calculating the inmate's parole guidelines score." Fennell & Hall, supra, 93 Harv. L. Rev. at 1651. Accordingly, section 4208 of the Parole Act requires the Commission to furnish prisoners with "reasonable access" to their presentence reports at least thirty days before any parole hearing, except for three categories of information that parallel those which sentencing courts are authorized to withhold under Rule 32. Id. at § 4208(b). As a result of Rule 32 and the Parole Act, respondent Julian has, on three occasions, reviewed his entire presentence report, but the Parole Commission has refused to allow him to keep a copy for himself.

While conceding that prisoners are entitled to review and even take verbatim notes of their presentence reports, the Parole Commission has advanced various reasons, over the last two decades, for refusing to give prisoners copies of the reports in response to FOIA requests. At first, the Commission's argument was that a presentence report in the possession of the Commission is not an "agency record" subject to the FOIA, but is instead a court document which is not within the coverage of the statute. That argument was rejected by the D.C. Circuit, see Carson v. Dep't of Justice, 631 F.2d 1008 (1980); Lykins v. Dep't of Justice, 725 F.2d 1455 (1984); and the Ninth Circuit, Berry v. Dep't of Justice, 733 F.2d 1343 (1984), but was accepted by the Tenth Circuit, Cook v. Willingham, 400 F.2d 885 (1968), and the First Circuit, Crooker v. United States Parole Commission, 730 F.2d 1 (1984). However, in response to a petition for certiorari in Crooker, the Parole Commission reversed the position that it

had taken for over fifteen years, and conceded that presentence reports in the possession of the Parole Commission are "agency records" subject to the FOIA. See Opposition of Respondent, Crooker v. U.S. Parole Commission, No. 83-2082 (U.S. June 18, 1984) ("Crooker Opp."). Citing the same provisions of the Parole Act on which the prisoner-requesters had previously relied in the First, Ninth, and D.C. Circuits, the Commission acknowledged that it has control over the presentence reports in its possession, largely because it is required to give prisoners access to their reports prior to parole hearings. Id. at 9-10. In addition, the Commission explained that the Parole Act "does not grant the sentencing court authority to determine whether and in what manner the prisoner will be afforded that right of access," and acknowledged that the Parole Act itself "does not prohibit the Commission from furnishing the prisoner with a copy of the report." Id. at 11, 17.

Furthermore, the Commission represented to this Court that Fed. R. Crim. P. 32 "does not speak" to whether the Commission can give prisoners copies of their presentence reports, and thus the "Bureau of Prisons and Parole Commission are free to make provision for disclosure to inmates and their counsel." Crooker Opp. at 15, quoting 97 F.R.D. 245, 309 (1983). The Commission also acknowledged both that Congress did not intend to prevent it from giving prisoners copies of their reports to keep, id. at 16 n.7, and that Congress adopted the Parole Act and amended Rule 32 in order to ensure that prisoners would have access to their reports. Id. at 13.

Over the government's objection, this Court granted the petition for certiorari in Crooker, vacated the First Circuit's decision, and remanded the case for further proceedings on the Commission's alternative arguments that presentence reports are exempt from disclosure under Exemption 3 of the FOIA, which applies to records that are "specifically exempted from



disclosure by statute," 5 U.S.C. § 552(b)(3), and Exemption 5, which allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Id. at § 552(b)(5). The First Circuit rejected the Commission's Exemption 3 argument on the grounds that neither the Parole Act nor Rule 32 bars the Commission from releasing copies of presentence reports, except for the three specific categories of information that the Parole Act authorizes the Commission to keep confidential. Crooker v. United States v. United States Parole Commission, 760 F.2d 1, 3 (1985). The court did not reach the Commission's Exemption 5 argument because it found that the Commission had made a "deliberate choice" not to raise the exemption at an earlier stage of the proceedings and had therefore waived its opportunity to raise the exemption. Id. at 2.

Despite its about-face on the "agency records" issue in Crooker, and the rejection of its Exemption 3 claim by the First Circuit, the Commission did not halt its efforts to prevent prisoners from obtaining copies of their presentence reports. Instead, it advanced the Exemption 3 and Exemption 5 claims in other circuits, where they were rejected -- as only slight variations on the Commission's "agency records" argument -- by every district judge to consider them, including two district judges in the Ninth Circuit, two district judges in the Third Circuit, and six different district judges in nine separate cases in the D.C. Circuit. However, in a divided ruling, a panel of the D.C. Circuit disagreed with all of these courts. While it did not reach the Commission's Exemption 3 claim, characterizing it as "less substantial," the Court upheld the Commission's contention that all presentence reports may be withheld in their entirety under Exemption 5. Durns v. Bureau of Prisons, 804 F.2d 701, 702 n.1 (1986).

Relying on this Court's decisions in FTC v. Grolier, Inc., 462 U.S. 19 (1983), and United States v. Weber Aircraft Corp., 465 U.S. 792 (1984), the D.C. Circuit ruled that, because presentence reports are not "routinely available" to third parties (usually co-defendants) in criminal cases, they can also be withheld from the prisoners themselves under Exemption 5. 804 F.2d at 704. In dissent, Senior Judge Skelly Wright argued that the majority had created a "vastly expanded Exemption 5 rubric," and that neither Grolier nor Weber Aircraft "remotely resembles the present situation," in which prisoners actually have a "statutory entitlement to access." Id. at 706, 708 (emphasis in original). By a 6-5 vote (with Senior Judge Wright not voting), the full D.C. Circuit denied the prisoners' petition for rehearing en banc. In dissenting from the denial of rehearing, Chief Judge Wald, joined by three other members of the court, stated that the panel decision "badly needs reconsideration," and described the panel's rationale for invoking Exemption 5 as "almost a parody of legal formalism . . .." 806 F.2d 1122, 1124. On March 17, 1987, the prisoner-requesters filed a petition for certiorari in Durns, which is still pending.

One week after the D.C. Circuit's denial of rehearing, the Ninth Circuit ruled in this case, agreeing with the First Circuit and the ten district judges who rejected the Parole Commission's exemption claims. See Julian v. U.S. Dep't of Justice, 806 F.2d 1411 (1986); App. 2a. With respect to the government's Exemption 3 claim, the Ninth Circuit found that Rule 32 and the Parole Act do not "establish complete exemptions" because they generally "require disclosure to the defendant and his attorney" prior to sentencing and parole hearings. App. 8a. Accordingly, the court determined that Exemption 3 only permits withholding of the specific categories of information which Congress has authorized sentencing courts and the Parole Commission to withhold, i.e., "the probation officer's sentencing recommendation, diagnostic opinions which might disrupt the inmate's rehabilitation if disclosed, and information obtained on a promise of confidentiality and any other information which, if disclosed, might result in harm to any person." App. 9a.

With respect to the Parole Commission's Exemption 5 claim, the Ninth Circuit came to an "opposite conclusion" from the D.C. Circuit because the government had "failed to identify an existing statutory or common law privilege that exempts presentence reports from discovery" by the subjects of the reports. App. 10a. Moreover, the court noted that, even if there were such a privilege, it has been waived by Congress, because both Rule 32 and the Parole Act require the disclosure of presentence reports to the subjects of the reports. Id. at 1419 n.7. In addition to this case, in which the petition for a writ of certiorari was filed on February 18, 1987, cases raising the same issue are also pending in the Third Circuit, Morgan v. Miller, No. 86-5501 (argued Feb. 24, 1987), and the Eleventh Circuit, Scott v. Parole Comm'n, No. 83-8805 (11th Cir.).

## DISCUSSION

Respondent agrees that review by this Court is appropriate, but not for the reasons suggested in the government's petition. The government contends that the Ninth Circuit decision "compromises the confidentiality of presentence reports," Pet. at 23, but that argument borders on the frivolous in light of the fact that prisoners are already entitled to review their reports before both sentencing and parole decisions. The respondent Julian, for example, has already been permitted to review his presentence report on three separate occasions. The Parole Commission's argument also makes no sense in view of the fact that the Commission itself has stated, in the past, that giving prisoners copies of their presentence reports is "good correctional policy," see Appendix, as well as the fact that the

whenever sentencing courts have not objected to disclosure.[1]

Despite the logical flaws reflected in the government's petition for review, review by this Court is necessary because there is a direct conflict in the circuits. Because the Ninth and D.C. Circuits have reached opposite conclusions on this issue, federal prisoners will receive unequal treatment, insofar as access to their crucial presentence reports is concerned, until the conflict is resolved.

Moreover, review is appropriate because the government's arguments here and in the D.C. Circuit in Durns are flatly inconsistent with representations the government made to this Court in the Crooker case. Thus, the government's petition for review in this case states that presentence reports may be withheld under Exemption 3 because Rule 32 of the Fed. R. Crim. P. and the Parole Act "authorize . . . the withholding of a copy [of the presentence report] from the subject of the report." Pet. at 21 (emphasis in original). Yet, in its opposition to the petition for certiorari in Crooker, the Commission informed the Court that these statutes do "not prohibit the Commission from furnishing the prisoner with a copy of the report." Crooker Opp. at 17. Likewise, the government's petition for review here suggests that Congress made a "deliberate judgment" not to allow prisoners to keep copies of their presentence reports, Pet. at 18, while in Crooker the government told the Court that "the Bureau of Prisons and Parole Commission are free to make provision for disclosure to inmates and their counsel," and that Congress did not intend to prevent the Commission from giving prisoners copies of their reports to keep. Id. at 15, 16 n.7.

Finally, as our discussion of the background of this case

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[1]The government's analysis of the Exemption 5 issue, and particularly this Court's decisions in Grolier and Weber Aircraft, is also deeply flawed, as indicated in the petition for certiorari filed in the Durns case.

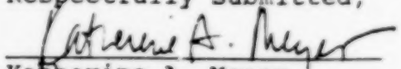


presentence reports under the FOIA has received an extraordinary amount of attention in the federal courts, largely because the government has invented new legal rationales for withholding the reports each time one of their other justifications has been rejected by the courts or discarded by the Parole Commission itself. In fact, the government's Exemption 5 argument, on which it now principally relies, represents the fourth separate rationale it has advanced for withholding copies of presentence reports from prisoners who have already seen them. See Carson v. Dep't of Justice, 631 F.2d 1008 (D.C. Cir. 1980) (presentence report withheld because it is not an "agency record" subject to the FOIA); Lykins v. Dep't of Justice, 725 F.2d 1455 (D.C. Cir. 1984) (government argued that presentence report was not "improperly withheld" under the FOIA because the sentencing court had issued an order prohibiting the release of the report); Crooker v. United States Parole Commission, 760 F.2d 1 (1st Cir. 1985) (presentence report withheld under Exemption 3 of the FOIA). Therefore, definitive resolution by this Court is essential to prevent the federal courts from spending additional unnecessary resources on this issue.

CONCLUSION

Because of the conflict in the circuits, the inconsistency in representations that the government has made to this Court, and the massive amount of time and resources that the federal courts have already spent on the issue, the Court should grant review in both this case and the Durns case decided by the D.C. Circuit.

Respectfully submitted,



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Kenneth Micahel Julian

May 12, 1987

APPENDIX

Memorandum

Subject: Presentence Report Disclosure (with specific reference to the request of [redacted])

Date: September 9, 1982

To: William H. Webb, Chief
U.S. Probation Officer
U.S. District Court

From: Benjamin F. Baer, Chairman
U.S. Parole Commission

We have recently received a request under the Freedom of Information Act from a prisoner convicted in the U.S. District Court for the District of Columbia for a copy of the presentence investigation report prepared by your office. The prisoner has not, to our knowledge, approached the Court for a copy. The purpose of this memorandum is to request that the Commission be informed of the official position of the Court with respect to the status of this and other reports prepared by your office; that is, whether the Court wishes to retain control over the reproduction of its reports or whether the Commission is to consider the report an agency document like any other, which it is free to reproduce in response to requests under the Freedom of Information Act.

Although the Parole Commission believes that it would be good correctional policy to have copies of these reports given to defendants at sentencing or as soon thereafter as feasible, we recognize that the report is originated by the Court, which has the initial prerogative under Rule 32(c)(3)(D), F.R. Crim. P., to decide the question of who retains copies and when. Our rule at 28 C.F.R. §2.56(b), accordingly, directs all requests for these reports to the sentencing court.

Our present need for instruction from the Court stems from the fact that in Carson v. U.S. Department of Justice, 631 F.2d 1008 (D.C. Cir. 1980), a presentence report from the District of Massachusetts was held to be an "agency record" subject to the Freedom of Information Act (FOIA) in the absence of any express retention of control by the sentencing court. After the U.S. District Court for the District of Massachusetts issued an "order retaining custody and control" of all presentence reports prepared in that district, Judge Gasch on remand held that he was without jurisdiction to order the release of the report under the FOIA.



CERTIFICATE OF SERVICE

I hereby certify that the foregoing response to petition for certiorari to the United States Court of Appeals for the Ninth Circuit has been served, by first class mail, postage-prepaid, on counsel for petitioners, Leonard Schaitman and Sandra Wein Simon, Department of Justice, Washington, D.C. 20530, and on the Solicitor General, Charles Fried, U.S. Department of Justice, Washington, D.C. 20530, this 12th day of May, 1987. All persons required to be served have been served.

Katherine A. Meyer
(Attorney of Record for Respondent Kenneth Michael Julian)

# OPPOSITION

# BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

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UNITED STATES DEPARTMENT OF JUSTICE, et al.,

PETITIONERS

v.

KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE

---

MOTIONS, BRIEFS, FILED IN RESPONSE TO JURISDICTIONAL STATEMENTS. PETITIONS FOR CERTIORARI

86-1357

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AMENDED

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## QUESTION PRESENTED

Whether a presentence investigation report prepared for Federal District Court in sentencing the Respondent and then was transmitted to the Parole Commission for their files and determination of Respondent's parole date, after report has left the sentencing Court, it then goes into the agency hand, making it mandatory upon request. Private Act. FOiA, 5 U.S.C. (& Supp. 111) 552 Appendix P. 28.11(D).

Opinion of Court of Appeal should be upheld.

Forma Pauperis was granted, 28 U.S.C. §1915, 18 U.S.C. §3006A(d)(6).

Consolidated two cases under the FOiA Act. S.U.S.C. (& Supp. 111) 552. Private Act.

These cases were brought in District of Arizona and the Northern District of California - MARGARET WALLACE, Respondent in District of Arizona, Kenneth Michael Julian, the named Defendant in United States Parole Commission suit.

Petitioner and Charles Turnbo, Warden of Federal Correctional Institution at Pleasanton, California.

Petitioner seeks review of the decision of the United States Court of Appeals for the Ninth Circuit in consolidated appeals in two cases. Arrived under Freedom of Information Act (F.O.i.A., 5 U.S.C. (& Supp. 111)) 552.

Respondent seeks a review to close this case. Time has been sufficient. Constitutional right has been violated.

Rehearing was denied December 23, 1986.

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V

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

No.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Petitioners

v.

KENNETH MICHAEL JULIAN AND MARGARET J. WALLACE

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

RESPONDENT DISPROVES OF CERTIORARI

The Solicitor General, on behalf of the Department of Justice, the United States Parole Commission, and the Warden of the Federal Correctional Institution at Pleasanton, California, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respondent is asking for disapproval of review because time has been suffered.

## Opinions Below

The opinion of the Court of Appeals (App., infra, 1a-15-2) six judges, was in favor of Denial of Rehearing. The Order was favorable from the District and United States Court of Appeals. (See page D).

The practice of the Court of Appeals for the Ninth Circuit is to make sound decisions, and with justice and right judgment.

Statutory Provisions, Rules and Regulations involved relevant provisions of the Freedom of Information Act, 5 U.S.C. 552(a) Private Act, Appendix P. 28(B); refused to comply with an individual request under (d)(1) of this section; (C) fails to maintain any records concerning any individual with such accuracy; relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefit to the individual that may be made on the

basis of such record, and, consequently, a determination is made which is adverse to the individual; or (D) fails to comply with any other provision of subsection (g)(1)(A) of this Section. The Court may order the agency to amend the individual's record in accordance with his request, or in such other way as the Court may direct. In such a case the Court shall determine the matter de Novo.

Petition for Rehearing. United States v. Bechtel, 547 F.2d 1379, 1380 (9th Cir. 1977).

Dove v. United States, 423 U.S. 325 (1976).

In FOiA - Privacy Act - Appendix P. 29, "(2) define reasonable times, places, and requirements for identifying an individual who requests records or information pertaining to them before the agency shall make the record or information available to the individual; "(3) establish procedures for the disclosure to an individual upon their request of their record or information

pertinent to a person, of their record, including Special Procedure, if deemed necessary, for the disclosure to an individual of all records pertaining to the individual. "(g) (1) Civil Remedies - Whenever any agency: "(A) makes a determination under subsection (d)(3) of this Section not to amend an individual's records in accordance with their request, or fails to make such review in conformity with that subsection; (B) refuses to comply with an individual request under subsection (d)(1)." - "(C) fails to maintain any record concerning any individual with such accuracy, relevance" - "(A) actual damages sustained by the individual as a result of the refusal or failure." To comply with orders of court.

Pleading: 28 U.S.C. §2403(b). Respondent's Constitutional right was violated - is in question. Violation of Private Act - is injuries accrued due to the aggravation which also caused

Respondent undue hardship and grievance.

Respondent needs a copy of her presentence report after filing Writ of Habeas Corpus. It was requested from the Agency. Respondent seeks damages.

The Government also relied on Rule 32(c), having been rejected, Petitioner repeatedly relied on Zale Corp. vs. Internal Revenue Service, 481 F Supp 486, DDC (1979), the Ninth Circuit has expressly rejected the Zale disclosure scheme. Respondent prays for denial. The time has been over-expressed by the Court, Contempt of Court, right to fully make decision. See Berry vs. Department of Justice, 733K, 2d 1343, 9th Circuit (1984), 5 U.S.C. 552(a)(g)(4), Reynolds v. McCalí, 701 F2d 810 (9th Cir. 1983).

Introduction

This Motion Brief is chiefly a response to Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, submitted by

Margaret Wallace. These consolidated appeals, in this Motion Brief for presentence report is the issue before this Court, subject to mandatory disclosure upon request under the freedom of information act; Private Act, 5 U.S.C. 552 (a). (FOiA). There is evidence of Agency acting intentionally and wilfully rejected: 5 U.S.C. 552(a) (S). Government also relied on Risshio, 773 F.2d at 1392.

4. Conclusion

Petitioner was in Contempt of Court Order. There are many reasons why the relief sought should have been granted. Respondent suffered undue hardship, injury, mental stress, moral, physical and emotional injury - also, embarrassment, deprivation of right to due process of law. Respondent prays for relief sought.

Civil Discovery, Kerr vs. U.S. District Court. Violation of Right of Private Act. Public law 93-579, 93 Congress, S3413, December 31, 1974,

Amendment Title 5.

An amount of eighteen million dollars, or as the Court sees just; all charges be dismissed; any remaining records sealed; District Court Order be granted and appeal also be upheld. District Court therefore, treats it as suit under Private Act, if enforced, 28 U.S.C. 2241 (E.R. 11) FOiA (App; infra, 17a) as the agency withheld document. See 5 U.S.C. 552 (a) (4) (B).

Department of Justice, 733K, 2d 1343, 9th Circuit (1984), 5 U.S.C. 1552 (9) (g)(4), Reynolds vs. McCall 701 F2d 810 (9th Cir. 1983).

Good Cause now pending before this Court, Respondent is asking for denial of Petition filing Writ of Certiorari. Respondent is asking this Honorable Court for the denial. Petitioner wilfully and wrongfully withheld the presentence report with prejudice, and violated all Respondent's Constitutional rights and due process of law.

After sentence, Court ordered all records released upon filing of Habeas Corpus. Respondent filed Writ of Habeas Corpus.

After report has left the sentencing Court, it then goes into the agency hand, making it necessary as 9th Circuit express. Parrott vs. Taylor. Also, Government relied on Zale, as 9th Circuit expressly rejected and denied Zale. Respondent sees that Petitioner wilfully and wrongfully rejected the Order of Courts due to rejecting Order while acting under State Color of Law. Parrott vs. Taylor. 151 U.S. 52742 U.S.C. 1983 . Respondent suffered under due process of law after being rejected after sentencing Court ordered all records released.

Petitioner's action in this case has caused Respondent Mental Stress, Physical Injury, Emotional Stress, Moral Embarrassment, Deprivation of right and of Constitutional Rights, Damages and

December 31, 1974, Amendment Title 5. FOiA Act 54 U.S.C. (& Supp. 111) 552 (Agency upon request).

Good Cause now before this Court for denial of Certiorari. Respondent is asking for relief sought and if case may be closed as Ordered by the Courts, that of Appeal, en banc, D.C., after six judges denied ruling. Respondent is asking the opinion of the Court of Appeals remains and that the District Court Judgment be enforced.

Respectfully submitted,

Margaret Wallace
P. O. Box 1379
Hollywood, CA 90028

FILED

DEC 30 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| KENNETH MICHAEL JULIAN,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>UNITED STATES DEPARTMENT OF JUSTICE,<br><br>Defendant-Appellant. | C.A. No. 85-2649<br><br>D.C. No. CV 85-00084 CLO-RMB |

On Appeal From the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding

| | |
|---|---|
| MARGARET J. WALLACE<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>UNITED STATES PAROLE COMMISSION, and CHARLES TURNBO, Warden, F.C.I., Pleasanton, CA,<br><br>Defendants-Appellants. | C.A. NO. 85-2754<br><br>D.C. No. C84-7893 TEH<br><br>OPINION |

On Appeal From the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted September 14, 1986
San Francisco, California

APPENDIX A-1

of tax returns, 26 U.S.C. § 6103, preempted FOIA and provided the sole standard for disclosure of returns. We examined the text of section 6103 and its legislative history and found nothing to indicate that Congress intended section 6103 to operate independently of FOIA. Accordingly, we rejected the government's claim. Long, 742 F.2d at 1177.

Our analysis in Long requires us to find that FOIA is not implicitly supplanted by Rule 32 and section 4208 of PCRA. Nothing in the text of either provision or the legislative history of PCRA supports the claim that Congress intended to supersede FOIA.

The government relies on Ricchio v. Kline, 773 F.2d 1389 (D.C. Cir. 1985), to support its contention that Rule 32 and PCRA supersede FOIA. In Ricchio the Court of Appeals for the District of Columbia held that a doctoral candidate's request of transcripts of tape recordings of White House conversations involving former President Nixon was governed by the Presidential Records and Materials Preservation Act, 44 U.S.C. § 2111, rather than FOIA. Without passing on the wisdom of this decision we observe that a more compelling argument for displacing FOIA could be made in Ricchio than in the instant case. The Materials Preservation Act, unlike PCRA, is a comprehensive, detailed and carefully tailored provision governing disclosure of Presidential records. In addition, the legislative history of the MPA indicates that Congress intended it to displace FOIA. Ricchio, 773 F.2d at 1392 (quoting H.R. Rep. No. 1507, 93 Cong., 2d Sess. 1 (1974)). In contrast, the scheme prescribed by Rule 32 and



APPENDIX A-2

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

---

No. CIV-85-084-GLO-RMB

KENNETH MICHAEL JULIAN, PLAINTIFF,

*v.*

UNITED STATES DEPARTMENT OF JUSTICE,
DEFENDANT.

---

[Filed Aug. 5, 1985]

---

**ORDER**

IT IS ORDERED that plaintiff's Motion for Summary Judgment is GRANTED and defendant's Motion for Summary Judgment is DENIED.

This Court has ascertained that it is the policy of the sentencing court (Eastern District of California) to disclose all of the presentence report, including the recommendation, to a defendant in a criminal action. Under those circumstances there is no basis to withhold the presentence report from the plaintiff's review.

DATED: August 5, 1985.

/s/ RICHARD M. BILBY
Richard M. Bilby
*United States District Judge*

section 4208 does not approximate the specificity or particularity required to displace FOIA. Thus, we find that Ricchio is inapposite.

The judgments of the district courts are AFFIRMED.



APPENDIX C

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 84-7893 TEH

MARGARET J. WALLACE, PLAINTIFF,

*v.*

UNITED STATES PAROLE COMMISSION,
AND CHARLES TURNBO, WARDEN, F.C.I., PLEASANTON, ET AL.,
DEFENDANTS.

[Filed Sept. 6, 1985]

**ORDER**

Plaintiff Margaret Wallace brings this action for the release of a copy of her presentence report under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Plaintiff was formerly a federal prisoner, having been paroled from the Federal Correctional Institution, Pleasanton, California on April 17, 1985. On November 1, 1984 she made a request to the Parole Commission under the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, for all of the Commission's records on her. On March 25, 1985 the Parole Commission acted on the plaintiff's disclosure request by sending her copies of all documents in the Commission's file except those available to her at her institution and except for her presentence report.

Plaintiff then filed this suit, and an order to show cause was issued by this Court on May 22, 1985. For the reasons stated below, we grant in part and deny in part petitioner's application. We hold that a copy of plaintiff's presentence report must be released to her, but that plaintiff's request for damages must be denied.

Appendix D

(VERIFICATION - 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF _____

I, the undersigned, declare I am the _____

_____

in the above-entitled action; I have read the foregoing _____

_____

and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters, I believe it to be true.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____
Date Signature of Declarant

_____
Type or Print Full Name of Declarant and Title, if applicable

(PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of/employed in the aforesaid county, State of California; I am over the age of eighteen years and not a party to the within action; my business address/residence address is 207 S. Broadway,

Los Angeles, CA 90012

On May 26, 1987 19 ___ I served the foregoing MOTIONS, BRIEFS,

FILED IN RESPONSE TO JURISDICTIONAL STATEMENTS, PETITIONS FOR CERTIORARI

on the interested parties

in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

See attached list

I certify (or declare), under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

May 26, 1987 Doris Chessler
Date Signature of Declarant

Doris Chessler
Type or Print Full Name of Declarant

MOLLETTE PUBLISHING, INC. 800
(213) 626-0696

*(VERIFICATION - 446 and 2015.5 C.C.P.)*

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

*I, the undersigned, declare: I am the* _____

*on the above-entitled action; I have read the foregoing* _____

*and know the contents thereof, and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters, I believe it to be true.*

*I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.*

*Date* _____ _____
*Signature of Declarant*

_____
*Type or Print Full Name of Declarant and Title, if applicable*

*(PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.)*

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

*I am a resident of/employed in the aforesaid county, State of California; I am over the age of eighteen years and not a party to the within action; my business address/residence address is:* 207 S. Broadway,

Los Angeles, CA 90012

*On* June 14, 19 98, *I served the foregoing* MOTIONS, BRIEFS, FILED IN RESPONSE TO JURISDICTIONAL STATEMENTS, PETITIONS FOR CERTIORARI

*(set forth the exact title of the document served)*

*on* the interested parties

*in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Los Angeles, *California, addressed as follows:*

See attached list

*I certify (or declare) under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.*

June 14, 1987 _____
*Signature of Declarant*

_____
*Type or Print Full Name of Declarant*

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OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

May 18, 1987

Ms. Margaret Wallace
P.O. Box 1379
Hollywood, CA 90028

Re: United States Department of Justice, et al. v. Kenneth Michael Julian and Margaret J. Wallace, No. 86-1357

Dear Ms. Wallace:

This office received your response to the above-entitled petition for writ of certiorari on May 14, 1987, and copies are herewith returned.

Such a response must be printed in conformity with Rule 33 of the Rules of this Court which requires that such a response be on paper which is 9 1/8 by 6 1/4. If you can so proceed you may preface this response with a motion for leave to proceed *in forma pauperis* together with an affidavit in support thereof as stated in Rule 46. Enclosed is a copy of the Rules of the Court for your reference. Please note that the names and addresses of the government attorneys are not to appear on the cover of your pleading. You must serve, however, the Solicitor General and counsel for Mr. Julian with copies of your response as required by Rule 28.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By Francis J. Lorson

Francis J. Lorson
Chief Deputy Clerk

wjr
Enc.

cc: Hon. Charles Fried, Solicitor General
John S. Newberry, Esq.

# PETITIONER'S

# BRIEF

Supreme Court, U.S.
FILED
AUG 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1357

# In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

KENNETH MICHAEL JULIAN AND
MARGARET J. WALLACE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

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## QUESTION PRESENTED

Whether a presentence investigation report, which was prepared for use by the federal district court in sentencing the defendant and then was transmitted to the Parole Commission for use in determining his parole date, is subject to mandatory disclosure under the Freedom of Information Act, 5 U.S.C. (& Supp. III) 552.

## PARTIES TO THE PROCEEDINGS

Petitioners seek review of the single decision of the United States Court of Appeals for the Ninth Circuit in consolidated appeals in two cases arising under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552. Those cases were brought in different federal district courts:

1. Respondent Kenneth Michael Julian was the plaintiff in the suit brought in the United States District Court for the District of Arizona. The defendant in that suit was petitioner Department of Justice.

2. Respondent Margaret J. Wallace was the plaintiff in the suit brought in the United States District Court for the Northern District of California. The named defendants in that suit were petitioners United States Parole Commission and Charles Turnbo, the Warden of the Federal Correctional Institution at Pleasanton, California.*

---

* Petitioner Turnbo apparently was named because respondent Wallace styled her action as a petition for a writ of habeas corpus under 28 U.S.C. 2241 (E.R. 11), although the district court thereafter treated it as a suit under the FOIA (Pet. App. 17a). The proper defendant in a suit under the FOIA is the agency that withheld the document. See 5 U.S.C. 552(a)(4)(B). Respondent Turnbo therefore was not a proper defendant insofar as this case was permitted to proceed under the FOIA.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No. 86-1357

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

KENNETH MICHAEL JULIAN AND
MARGARET J. WALLACE

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE PETITIONERS

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 806 F.2d 1411. The orders of the district courts (Pet. App. 16a-22a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 30, 1986. The petition for a writ of certiorari was filed on February 18, 1987, and was granted on June 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS, RULE, AND REGULATIONS INVOLVED

Relevant provisions of the Freedom of Information Act, 5 U.S.C. 552(a)(3) and (4)(B), (b)(3) and (5); the Parole Commission and Reorganization Act of 1976, 18 U.S.C. (& Supp. III) 4205(e), 4207, 4208; Rule 32(c) of the Federal Rules of Criminal Procedure; and the Parole Commission regulations governing disclosure of information, 28 C.F.R. 2.55 and 2.56, are reproduced at Pet. App. 35a-47a.

## STATEMENT

In the federal criminal justice system as it now operates,[1] if a convicted defendant is sentenced to a term of imprisonment, the United States Parole Commission determines when the prisoner will be released on parole. The probation service's presentence report regarding the individual is a principal source of information for the court in deciding what sentence to impose and then for the Parole Commission in deciding when the prisoner should be released from custody. The question in this case is whether the copy of the presentence report that is transmitted by the probation officer to the Parole Commission for its use in making parole determinations about the prisoner is subject to mandatory release by the Parole Commission under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552.

In these consolidated cases, the requesters seeking to obtain copies of the particular presentence reports at issue are the subjects of those reports. Congress, this Court and the Parole Commisison have prescribed specific procedures that govern when, how,

[1] See note 4, *infra*.



and to what extent a defendant or prisoner may be granted access to his presentence report by the district court and the Parole Commission. Before stating the facts of these cases, we describe the applicable procedures.

### A. THE LEGAL FRAMEWORK GOVERNING PRESENTENCE REPORTS

#### 1. Use And Disclosure Of The Presentence Report By The District Court

Rule 32(c)(1) of the Federal Rules of Criminal Procedure provides that, prior to the imposition of sentence in a case in which the defendant has been found or has pleaded guilty, the probation service of the court must submit to the court a report of a presentence investigation into the defendant's background and the circumstances of the offense.[2] The presentence report must contain information concerning the prior criminal record of the defendant; the circumstances of the offense and the defendant's behavior; financial, social, psychological, physical or other harm to the victim; and any other information that may aid the court in sentencing, including the restitution needs of the victim. Fed. R. Crim. P. 32(c)(2).[3]

[2] The probation officer performs this and other functions under the direction of the district court. 18 U.S.C. 3654.

[3] A presentence report need not be prepared if the defendant (with the consent of the court) waives that requirement or if the court finds that the record already contains sufficient information to permit a meaningful exercise of its sentencing discretion. Fed. R. Crim. P. 32(c)(1). If the probation officer prepares the report before the defendant has pleaded guilty or nolo contendere or has been found guilty, the report shall not be submitted to the court "or its contents disclosed to anyone,"

Rule 32(c)(3)(A) provides that, at a reasonable time prior to sentencing, the district court shall permit the defendant and his counsel to read the presentence report, exclusive of any recommendation as to sentencing. The court then must afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to alleged inaccuracies (*ibid.*). However, the defendant and his counsel do not have a right to read the report to the extent that it contains: (i) diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation; (ii) sources of information obtained upon a promise of confidentiality; and (iii) any other information that, if disclosed, might result in harm to the defendant or other persons (*ibid.*). If the court intends to rely at sentencing on any factual material falling in one of these three exceptions, it must furnish the defendant with a written or oral summary of the material and afford the defendant and his counsel an opportunity to comment upon it. Fed. R. Crim. P. 32(c)(3)(B). Any material that may be disclosed to the defendant and his counsel must also be disclosed to the attorney for the government. Fed. R. Crim. P. 32(c)(3)(C).

If the testimony or comments introduced by the defendant or his counsel allege any factual inaccuracy in the report or summary, the court must either make a finding regarding the allegation or determine that no such finding is necessary because the controverted matter will not be considered in imposing sentence. Rule 32(c)(3)(D) provides that "[a] written record of such findings and determinations shall be appended

although the court may "inspect" the report at any time if the defendant consents (*ibid.*).



to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission."

Finally, Rule 32(c)(3)(E) provides that any copies of the presentence report that are made available to the defendant, his counsel, and the attorney for the government "shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs." Thus, although the defendant has a right, prior to sentencing, to *read* his presentence report (except for the recommendation as to sentencing and portions that may be summarized under Rule 32(c)(3)(A)), the defendant has no right to *retain* a copy of the report unless the court affirmatively authorizes him to do so. In addition, the courts have uniformly held that a presentence report is privileged from disclosure by the district court to a third party, at least in the absence of a showing of particularized need. See pages 21-22, *infra*.

**2. Use And Disclosure Of The Presentence Report By The Parole Commission And Bureau Of Prisons**

a. If the defendant is sentenced to a term of imprisonment, the date on which he will be released on parole is determined by the Parole Commission, an agency in the Department of Justice that was established by the Parole Commission and Reorganization Act of 1976, 18 U.S.C. (& Supp. III) 4201 *et seq.* (Parole Act). See 18 U.S.C. 4202.[4] In making a

[4] The Parole Commission will be phased out under the sentencing provisions of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. 2, 98 Stat. 1987. Those provisions prescribe standards for the imposition of sentences by the district courts (18 U.S.C. (Supp. III) 3551

parole decision, the Commission is required to consider the presentence report (18 U.S.C. 4207(3)), as well as the prisoner's criminal record, the recommendation of the sentencing court, reports submitted by the correctional institution, and the results of various examinations. 18 U.S.C. (& Supp. III) 4207. To ensure that the Parole Commission has the requisite information, it is "the duty of the various probation officers" to furnish to the Commission, upon request,

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*et seq.*) and establish a United States Sentencing Commission, which is responsible for promulgating guidelines and general policy statements concerning, inter alia, whether to impose a sentence of imprisonment and what the length of the term should be (28 U.S.C. (Supp. III) 991 *et seq.*). In general, the 1984 Act requires a fixed term of imprisonment in those cases in which a sentence of imprisonment is imposed (18 U.S.C. (Supp. II) 3581, 3582(a) and (c)); there is no provision for release on parole prior to the end of that term (18 U.S.C. (Supp. III) 3621(a), 3624(a)). Because parole has been eliminated, the 1984 Act, as amended, provides that the Parole Act shall be repealed (on a prospective basis) effective November 1, 1987, when the new sentencing provisions go into effect. Pub. L. No. 98-473, §§ 218(a)(5), 235(a)(1), 98 Stat. 2027, 2031; Pub. L. No. 99-217, § 4, 99 Stat. 1728.

The Parole Commission will, however, remain in existence for five years after November 1, 1987, in order to render parole decisions with respect to prisoners who were sentenced prior to that date, and the Parole Act therefore will remain in effect for five years with respect to those individuals. Pub. L. No. 98-473, § 235(b)(1)(A) and (3), 98 Stat. 2032. The Commission will continue to have custody of presentence reports for as long as it remains in existence. Moreover, even after that time, the Bureau of Prisons will continue to receive copies of presentence reports from the district courts. For these reasons, despite the phasing out of the parole system, the question whether copies of presentence reports are subject to mandatory release under the FOIA is of substantial practical importance to both the Parole Commission and the Bureau of Prisons.



any available information about the prisoner. 18 U.S.C. 4205(e). The probation officer typically discharges this duty by furnishing a copy of the presentence report about the prisoner.

The presentence report is also utilized by the Bureau of Prisons in determining the proper classification of the prisoner (see 28 C.F.R. 524.10, 524.12 (e)), appropriate treatment programs, and the prisoner's eligibility for furloughs and privileges. See Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1679 (1980) [hereinafter Fennell & Hall]. Although Congress has not by law required the probation officers to furnish the presentence report to the Bureau of Prisons as they must to the Parole Commission, the probation officers have done so for many years and Fed. R. Crim. P. 32(c)(3)(D) now expressly endorses that practice. See Fennell & Hall, 93 Harv. L. Rev. at 1679; 97 F.R.D. 245, 306, 308 (1983) (advisory committee note to 1983 Amendments to Rule 32(c)).

The Bureau of Prisons, like the Parole Commission, is an agency of the Department of Justice (18 U.S.C. 4041, 4042), and its use of the presentence report is therefore closely coordinated with that of the Commission. For example, although 18 U.S.C. 4205(e) requires the probation officer to furnish a copy of the presentence report to the Parole Commission, in practice the probation officer furnishes the report in the first instance to the Bureau of Prisons, which has a more immediate need for it in determining the appropriate security level for the prisoner. See Schmolesky & Thorson, *The Importance of the Presentence Investigation Report After Sentencing*, 18 Crim. L. Bull. 406, 408-409 (1982).

b. The Parole Act provides that at least 30 days prior to a scheduled parole hearing, the prisoner shall be provided with "reasonable access to a report or other document to be used by the Commission in making its determination." 18 U.S.C. 4208(b). Implementing Parole Commission regulations provide that because the Commission's file consists mainly of documents furnished to it by the Bureau of Prisons, the prisoner ordinarily can be given access to the relevant documents by granting him access to documents in the institutional file that the Bureau of Prisons maintains on the prisoner. 28 C.F.R. 2.55(a)(1). Under settled practice pursuant to 18 U.S.C. 4208(b), the prisoner may read the copy of his presentence report that is contained in the institutional file, but may not obtain a copy of it. See also 28 C.F.R. 2.55(a)(3). This procedure directly parallels the right under Fed. R. Crim. P. 32(c) to read but not to receive a copy of the report prior to sentencing.

Moreover, under 18 U.S.C. 4208(b), a prisoner may be denied access to any document, including his presentence report, to the extent it contains information that falls within one of three categories that also directly parallel the three exceptions in Fed. R. Crim. P. 32(c)(3)(A)—information that could disrupt the prisoner's institutional rehabilitation program if it were disclosed to him, or that might reveal a confidential source or result in harm to any person. See page 4, *supra*. If the presentence report or other document contains such information, the Parole Commission or the originating agency must furnish the prisoner with a summary of the information withheld, just as Fed. R. Crim. P. 32(c)(3)(B) requires the court to do at the time of sentencing. 18 U.S.C. 4208(c); 28 C.F.R. 2.55(c) and (d). As contemplated by



18 U.S.C. 4208(c), the usual practice is for the probation officer to identify for the Parole Commission any portions of the presentence report that were summarized for the defendant at the time of sentencing and to furnish those summaries to the Commission for its use when the prisoner is given access to the report prior to his parole hearing. See Probation Division, Administrative Office of the United States Courts, *The Presentence Investigation Report* 2 (1984).

c. Aside from these provisions implementing the prisoner's limited statutory right of "reasonable access" to his presentence report and other relevant materials in connection with his preparation for a parole hearing, the Parole Act makes no provision for release or disclosure of the presentence report to the prisoner or anyone else. In addition, pursuant to 5 U.S.C. 552a(j)(2), the Parole Commission's system of records that contains the presentence report and other material pertaining to the prisoner has long been exempted by regulation from the provisions of the Privacy Act (5 U.S.C. 552a(d)) that generally grant an individual a right to review and receive a copy of records that an agency maintains about him. 28 C.F.R. 16.85(a)(2); see 40 Fed. Reg. 38755, 39408, 39412 (1975); 41 Fed. Reg. 12640, 12643 (1976).[5] Notwithstanding this general exemption,

[5] The Privacy Act regulations explain that this system of records has been exempted in order, inter alia, to prevent disclosures that "would jeopardize legitimate correctional interests of security, custody, supervision, or rehabilitation"; "to permit receipt of relevant information from * * * law enforcement agencies[] and federal and state probation and judicial offices"; "to allow private citizens to express freely their opinions for or against parole"; and "to allow a candid process of fact selection, opinion formulation, evaluation and recommendation" (28 C.F.R. 16.85(b)(3)).

however, the Commission has by regulation provided a mechanism by which a prisoner or parolee may receive a copy of certain documents pertaining to him, even though he does not have a scheduled parole hearing that would trigger his statutory right of "reasonable access" to those materials. See 28 C.F.R. 2.56. However, the regulation explicitly states that "[a]ny request for copies of court documents (including the presentence investigation report) must be directed to the appropriate court." 28 C.F.R. 2.56(b). By operation of this regulation, the Parole Commission defers —as a general matter, not merely at the time the prisoner is granted access to his file prior to a parole hearing—to the sentencing court's determination with respect to whether the prisoner will be permitted to obtain and keep a copy of his presentence report.

**B. THE PROCEEDINGS IN THESE CASES**

1. a. Respondent Kenneth Michael Julian is an inmate at the Federal Correctional Institution in Safford, Arizona. Julian is serving a ten-year term of imprisonment following his conviction in the United States District Court for the Eastern District of California for the unlawful manufacture of silencers and illegal weapons and the manufacture of methamphetamines. Pursuant to Fed. R. Crim. P. 32(c)(1), a presentence report was prepared on Julian by the probation officer prior to sentencing. After he began serving his sentence, Julian requested a copy of his presentence report from the Parole Commission on October 17, 1984. When that request was denied, Julian brought an action in the United States District Court for the District of Arizona on January 30, 1985, seeking to compel the release of a copy of his presentence report under the FOIA. In a brief



order dated August 5, 1985, the district court granted Julian's motion for summary judgment (Pet. App. 16a).

b. Respondent Margaret J. Wallace was convicted in the United States District Court for the Central District of California on 15 counts of forging United States Treasury checks, in violation of 18 U.S.C. 495. She was sentenced to a term of three years' imprisonment. A presentence report was prepared by the probation officer prior to her sentencing. On November 1, 1984, while serving her sentence in the Federal Correctional Institution at Pleasanton, California,[6] Wallace filed a request with the Parole Commission for all of the Commission's records pertaining to her. On March 25, 1985, the Commission furnished Wallace with copies of all documents in the Commission's files, except for a copy of her presentence report (and certain other records that were already available to her in her institutional file at the Pleasanton FCI). Wallace then filed suit in the United States District Court for the Northern District of California seeking to compel release of an actual copy of her presentence report. By order dated September 6, 1985, the district court ordered the Parole Commission to release a copy of the report to her under the FOIA (Pet. App. 17a-22a).

2. The court of appeals consolidated the government's appeals in the two cases and affirmed the judgment in each (Pet. App. 1a-15a). The court held that a prisoner has an absolute right under the FOIA to obtain a copy of the presentence report (except summarized portions) from the Parole Commission, even though Fed. R. Crim. P. 32(c)(3)(E) and the

[6] Respondent Wallace was released on parole on April 17, 1985, and completed serving her sentence on August 17, 1986.

Parole Commission's parallel procedures that implement the "reasonable access" requirement of the Parole Act (18 U.S.C. 4208(b)) only confer a right to read the report, not to obtain and keep a copy of it.

a. The court of appeals rejected the government's submission that the Parole Commission may withhold a copy of the presentence report from the prisoner under FOIA Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" (5 U.S.C. 552(b)(5)). Pet. App. 9a-14a. The court of appeals recognized that Exemption 5 protects those documents that are "'normally privileged in the civil discovery context'" (Pet. App. 10a, quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). And it recognized as well that the courts have uniformly held that presentence reports are normally privileged from disclosure to third parties and will be released only upon a particularized showing that the "'ends of justice'" so require (Pet. App. 11a-12a & n.6, quoting *United States* v. *Figurski*, 545 F.2d 389, 391 (4th Cir. 1976)). But the court did not believe that those judicial decisions justified withholding a copy of the report from the person who is the subject of the report, since he is permitted by Rule 32(c)(3)(A) and 18 U.S.C. 4208(b) to read the report (although not to keep a copy of it) prior to his sentencing and parole hearing (Pet. App. 4a-5a, 12a). In so holding, the court of appeals acknowledged (*id.* at 10a) that its decision conflicted with *Durns* v. *Bureau of Prisons*, 804 F.2d 701 (1986), petition for cert. pending, No. 86-6550, in which the D.C. Circuit held that presentence reports are protected by Exemption 5 because "[a]n impressive body of doctrine recognizes the[ir]



privileged nature" (804 F.2d at 704). The court below reached an "opposite conclusion" because it did not find an "established privilege" under statutory or common law in the specific context of disclosure to the subject of the presentence report (Pet. App. 10a-11a & n.5).

b. The court of appeals also held that the Parole Commission's copy of a presentence report is not protected by Exemption 3, which provides that the FOIA does not apply to matters that are "specifically exempted from disclosure by statute" if the statute, inter alia, "refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3)(B). In its Exemption 3 analysis, the court focused on the information contained in the report, rather than an asserted right of a prisoner to obtain an actual copy of the report. Viewing the matter from the former perspective, the court reasoned that Rule 32(c) and 18 U.S.C. 4208 do not exempt all information in a presentence report from disclosure to the defendant, but rather permit the sentencing court and Parole Commission to withhold only such information as falls within one of the three exceptions in Rule 32(c)(3)(A) or 18 U.S.C. 4208(c)—*i.e.*, diagnostic opinions that might disrupt the program of rehabilitation, sources of information obtained upon a promise of confidentiality, or other information that might result in harm to the subject of the report or to third parties. Pet. App. 7a-9a.[7]

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[7] The court indicated that if the requester were a third party, rather than the subject of the report, additional portions of the presentence report might be withheld under FOIA Exemption 6, which applies to matters the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). See Pet. App. 8a n.4.

## SUMMARY OF ARGUMENT

Presentence reports contain highly confidential information whose " 'public availability * * * would likely inhibit the flow of information to the sentencing judge' " (*Durns* v. *Bureau of Prisons*, 804 F.2d at 705 (citation omitted)). Accordingly, they are generally kept in strict confidence and are not, for example, available to third parties in discovery except upon a showing that disclosure is " 'required to meet [the] ends of justice' " (*ibid.* (citation omitted)).

Fed. R. Crim. P. 32(c) and 18 U.S.C. 4208(b) give the defendant who is the subject of a presentence report limited access to the report on specified occasions. Prior to sentencing and again prior to parole consideration, the defendant has the right to *read* the report (except for portions containing the sentence recommendation, certain diagnostic opinions, certain disclosures of sources of information, or any information whose disclosure might harm any person including the defendant). But Rule 32(c) provides expressly and 18 U.S.C. 4208(b) provides implicitly that the defendant may not ordinarily *keep* a copy of the report. This carefully considered "sophisticated compromise" between confidentiality and disclosure accords with a widespread judgment that "permitting defendants to keep copies of their presentence reports would impede the ability of U.S. Probation Officers to gather information and protect their sources" (Pet. App. 30a).

The court of appeals nevertheless concluded that a defendant may obtain a copy of his presentence report from the Parole Commission under the FOIA. It ruled that neither Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," nor Exemption 3, which exempts matters "specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld," exempts a presentence report from disclosure *to the subject of the report*. These rulings reflect fundamental misunderstanding of the operation of FOIA.



With respect to Exemption 5, the court of appeals recognized that this exemption protects documents that are " 'normally privileged in the civil discovery context' " (Pet. App. 10a (citation omitted)) and that presentence reports are normally privileged from disclosure to third parties (see *id.* at 11a-12a), but it held that since the defendant has the right under Rule 32(c) to read the report prior to sentencing, Exemption 5 does not apply "when a FOIA request is made by the subject of the report" (Pet. App. 12a). There are two things wrong with that holding.

First, the court erred in treating the subject of the report as inherently different from other members of the public for FOIA purposes. Neither Exemption 5 nor the FOIA generally allows any such distinction between the rights of the particular requester and the rights of the general public. It is well established that the test under Exemption 5 is whether a document would be routinely available to a private party in discovery upon a showing of relevance, not whether the particular requester has a special interest in or need for the document. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802 n.20 (1984); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 27-28 (1983). The FOIA makes information available—or unavailable—to the public: it is not designed to provide a special

right of access to the subjects of government documents, and it does not permit documents to be made available to one requester that are denied to others.

Second, Rule 32(c) and 18 U.S.C. 4208(b) do not give the subject of a presentence report a routine right to a copy of the report. To the contrary, these provisions, together with the Parole Commission's regulations under the latter section, all of which are products of a lengthy history of deliberation about how to balance the needs of the defendant against the needs of confidentiality, routinely *deny* the defendant a copy of his presentence report. The court of appeals not only misread these provisions as providing the sort of availability of the documents that would defeat Exemption 5, it interpreted the FOIA to obliterate the sophisticated compromises reflected in Rule 32(c) and 18 U.S.C. 4208(b).

With respect to Exemption 3, it is clear that Rule 32(c)(3)(E), which requires the defendant, his counsel, and the government attorney to return their copies of the presentence report to the court after sentencing, is a "statute" within the meaning of that Exemption, that it refers with particularity to copies of presentence reports, and that it specifically authorizes them to be withheld. Although the Rule does not specifically address the public availability of the copy of the presentence report that is delivered to the Parole Commission so that it may consider the report as it is required to do by 18 U.S.C. (& Supp. III) 4207, there is plainly the requisite statutory authority to withhold that copy as well. First, 18 U.S.C. 4208(b), which provides that a prisoner shall have "reasonable access" to his presentence report in connection with his parole determination, is properly read to incorporate the rule that the prisoner ordinarily may



not obtain a copy of the report. Second, in any event, if a statute (or in this case, a rule legislated by Congress), provides for the withholding of a particular document, as Rule 32(c)(3)(E) does with respect to copies of presentence reports, Exemption 3 plainly protects that document in the hands of any government agency making proper and confidential use of it.

## ARGUMENT

### A PRESENTENCE INVESTIGATION REPORT IS EXEMPT FROM MANDATORY RELEASE UNDER THE FREEDOM OF INFORMATION ACT

#### I. Introduction

The broad mandate of the Freedom of Information Act is "to provide for open disclosure of public information." *Baldrige* v. *Shapiro*, 455 U.S. 345, 352 (1982) (footnote omitted). "The Act expressly recognizes, however, that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Ibid.*; see also *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). The material contained in a presentence investigation report clearly is not "public information" subject to "open disclosure."

Presentence reports have always been regarded as highly confidential documents, and with good reason. A presentence report contains detailed information about "every aspect of a defendant's life" (*Williams* v. *New York*, 337 U.S. 241, 250 (1949) (footnote omitted)), including the prosecution's and the defense's versions of the circumstances of the present offense; the defendant's past juvenile and adult criminal record; his family background, personality for-

mation, and current relationships with family members, friends, and associates; the defendant's marital relationship; his physical, mental, and emotional health; his education and employment history; his financial condition; and the probation officer's assessment. Probation Division, *The Presentence Investigation Report*, *supra*, at 8-17. The report also necessarily contains information obtained from or pertaining to third parties, including statements of witnesses to and victims of the offense; a "victim impact statement" that describes the financial, social, psychological and physical harm to the victim; information about co-defendants; and the broad range of personal opinions and information concerning or obtained from, family members, friends and associates (*ibid.*).

It is obviously critical to the success of the probation officer's goal of obtaining the most complete and accurate information that the confidentiality of the report be maintained to the maximum extent possible. On the other hand, the subject of the report has a legitimate interest in having access to information in the report on those particular occasions when the report will be relied upon in making an adjudicatory determination about the individual, so that he can have an opportunity to point out and rebut any inaccuracies in the report. The legal rules governing access to and dissemination of presentence reports represent a "sophisticated compromise" between these competing interests. Fennell & Hall, 93 Harv. L. Rev. at 1634. The reports are tightly held by the probation officer and the Parole Commission and are protected against disclosure to *anyone*—the defendant, the prosecution, and the world at large—except where there is a demonstrated need for access on a specific occasion. This tight control serves to ensure



that the copies of the report are not carelessly handled and do not fall into unauthorized hands. That extra measure of protection in turn provides possible sources of information, other individuals mentioned in the report, and the defendant himself "with an assurance of confidentiality that is as absolute as possible." *CIA* v. *Sims*, 471 U.S. 159, 175 (1985); *Baldrige* v. *Shapiro*, 455 U.S. at 361.

In accordance with these imperatives of confidentiality, the courts have uniformly held that a presentence report is privileged from disclosure to a third party, at least in the absence of a showing of particularized need akin to that required for a third party to obtain access to grand jury material protected by Fed. R. Crim. P. 6(e). See pages 21-22, *infra*; compare *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 442-445 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 221-224 (1979). Moreover, under long-established procedures, even the subject of the report has no right to obtain and keep a copy of the report. He is permitted only to *read* the report prior to sentencing and prior to his parole hearing, and on each occasion he must return it unless the court affirmatively allows him to keep a copy. By the same token, although the attorney for the government is also permitted to read the report prior to sentencing, he too must return his copy to the probation officer unless the court affirmatively allows him to keep it. Fed. R. Crim. P. 32(c)(3)(C) and (E). This reciprocal obligation on the part of the attorney for the government guards against subsequent use of the report for prosecutorial or investigative purposes, in the absence of a special showing of need. Routine use of the report for such purposes might chill the candor and open-

ness of the defendant, who ordinarily is the probation officer's primary source of information when preparing the report. See Probation Division, *The Presentence Investigation Report*, *supra*, at 3.

Against this background, it is manifest that presentence reports are not among the categories of "public information" that Congress intended to be subject to mandatory disclosure under the FOIA. *Baldrige* v. *Shapiro*, 455 U.S. at 352. To the contrary, this is a classic example of a situation for which, because Congress recognized that "public disclosure is not always in the public interest" (*ibid.*), it fashioned the exemptions from mandatory disclosure under the FOIA. Indeed, in this case, the copies of the presentence reports that respondents seek are protected against mandatory release under the FOIA by two separate provisions, Exemption 3 and Exemption 5. We discuss the latter exemption first.

## II. A Presentence Report is Protected From Mandatory Disclosure by Exemption 5 of the Freedom of Information Act

### A. *Presentence reports are protected by Exemption 5 from mandatory disclosure to the public*

Both the plain language of Exemption 5 and settled precedent establish that presentence reports are not subject to mandatory release or disclosure under the FOIA. Exemption 5 permits an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). There is no dispute in this case that the copy of the presentence report in the custody of the Parole Comission is an "inter-agency or intra-agency memorandum" for purposes of Exemption 5. It is equally clear that a presentence report "would not be available by law to a party other than an agency in litigation with the agency."



1. This Court has repeatedly held that "Exemption 5 incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). Accord, *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 26-27 (1983). In this case, a well-recognized privilege squarely covers the documents respondents seek.

As the District of Columbia Circuit recently observed, "[a]n impressive body of doctrine recognizes the privileged nature of presentence reports" (*Durns* v. *Bureau of Prisons*, 804 F.2d at 704). The courts have uniformly recognized that a presentence report is privileged from disclosure to a third party, at least in the absence of a showing that disclosure is "'required to meet [the] ends of justice'" (*id.* at 705, quoting *Hancock Bros.* v. *Jones*, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968)). See *United States* v. *McKnight*, 771 F.2d 388, 390 (8th Cir. 1985), cert. denied, No. 85-1016 (Feb. 24, 1986); *United States* v. *Anderson*, 724 F.2d 596, 598 (7th Cir. 1984); *United States* v. *Charmer Industries, Inc.*, 711 F.2d 1164, 1173-1176 (2d Cir. 1983); *United States* v. *Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977); *United States* v. *Cyphers*, 553 F.2d 1064, 1069 (7th Cir.), cert. denied, 434 U.S. 843 (1977); *United States* v. *Dingle*, 546 F.2d 1378, 1380-1381 (10th Cir. 1976); *United States* v. *Figurski*, 545 F.2d 389, 391-392 (4th Cir. 1976); *United States* v. *Walker*, 491 F.2d 236, 238 (9th Cir.), cert. denied, 416 U.S. 990

(1974); *United States* v. *Greathouse*, 484 F.2d 805, 807 (7th Cir. 1973); *United States* v. *Evans*, 454 F.2d 813, 820 (8th Cir.), cert. denied, 406 U.S. 969 (1972); *United States* v. *Mayse*, 467 F. Supp. 1339 (E.D. Tenn. 1979); *United States* v. *Krause*, 78 F.R.D. 203 (E.D. Wis. 1978).[8] The confidential and privileged nature of presentence reports under these decisions "reflects 'the prevailing judicial view that the public availability of presentence reports would likely inhibit the flow of information to the sentencing judge.'" *Durns* v. *Bureau of Prisons*, 804 F.2d at 705 (quoting *United States* v. *Charmer Industries, Inc.*, 711 F.2d at 1173). See also *Williams* v. *New York*, 337 U.S. at 247-250; Fennell & Hall, 93 Harv. L. Rev. at 1684-1685.

2. To date the decisions recognizing a privilege for presentence reports have involved efforts by third parties to obtain a presentence report from the sentencing court, not from the Parole Commission. But the ability of the probation officers to obtain complete and accurate information would be seriously undermined if presentence reports were publicly available

[8] A number of the presentence report cases cited in the text involve efforts by the defendant in a criminal prosecution to obtain the presentence report of a co-defendant or witness, often in order to use it for impeachment purposes. If presentence reports are privileged from routine release even in that setting, it should follow *a fortiori* that they are not routinely available in civil discovery. And in fact presentence reports also have been found to be privileged in civil proceedings, subject to release only for "the most compelling reasons." *United States* v. *Charmer Industries, Inc.*, 711 F.2d at 1174. See also *United States* v. *Krause, supra; Hancock Bros.* v. *Jones, supra.* Compare *United States* v. *Sells Engineering, Inc.*, 463 U.S. at 442-445; *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. at 221-224.



from *any* source. Accordingly, when Congress directed probation officers to furnish presentence reports to the Parole Commission (18 U.S.C. 4205(e)), it surely intended that the privilege attaching to the report while it remains a court document would continue to attach after its transmittal to the Parole Commission. *Durns* v. *Bureau of Prisons*, 804 F.2d at 705. That is especially so in view of Congress's recognition when it enacted the Parole Act in 1976 that parole operates essentially as "an extension of the sentencing process": the sentences of nearly all offenders include minimum and maximum terms that are set by the court within a range of discretion provided by statute, and then "[t]he final determination of precisely how much time an offender must serve is made by the parole authority." S. Rep. 94-369, 94th Cong., 1st Sess. 15-16 (1975); see also H.R. Conf. Rep. 94-838, 94th Cong., 2d Sess. 19 (1976); *United States* v. *Addonizio*, 442 U.S. 178, 188-190 (1979). The conclusion that Congress intended the privileged status of presentence reports to be identical in the two settings is also demonstrated by the fact that, as we explain below (see pages 37-38, *infra*), Congress deliberately patterned the provisions governing the prisoner's statutory right of "access" to his presentence report and other documents used by the Parole Commission after the analogous provisions of Fed. R. Crim. P. 32(c) that govern a defendant's right of access to the presentence report when it is under the control of the court.[9]

[9] In light of this self-evident proposition that presentence reports must be protected from mandatory disclosure by the Parole Commission to the same extent as they are from mandatory disclosure by the sentencing court, the Department of Justice at one time took the position that copies of presentence

reports in the possession of the Parole Commission and Bureau of Prisons are not "agency records" for purposes of the FOIA, but instead are court documents that are altogether excluded from the coverage of the FOIA. See 5 U.S.C. 551(1)(B) (the term "agency" does not include "the courts of the United States"). That position was accepted by three courts of appeals. See *Lindsey* v. *Bureau of Prisons*, 736 F.2d 1462 (11th Cir. 1984); *Crooker* v. *Parole Comm'n*, 730 F.2d 1 (1st Cir. 1984); *Cook* v. *Willingham*, 400 F.2d 885 (10th Cir. 1968). Two other courts of appeals reached a contrary conclusion. See *Berry* v. *Department of Justice*, 733 F.2d 1343 (9th Cir. 1984); *Lykins* v. *Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984); *Carson* v. *Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980).

Thereafter, in the brief in opposition to the certiorari petition filed by the requester in *Crooker*, the Solicitor General represented that the Parole Commission would no longer withhold presentence reports on the ground that they are not "agency records" for purposes of the FOIA. That new position was taken in view of the importance of the presentence report in the parole determination, the Commission's control over the copy of the report in its possession, and the 1983 Amendemnts to Fed. R. Crim P. 32(c) that recognized the Commission's use and control of the report. See Br. in Opp. at 8-18, *Crooker* v. *Parole Comm'n*, 469 U.S. 926 (1984). The Solicitor General further argued (*id.* at 18-20), however, that presentence reports are exempt from mandatory disclosure by Exemptions 3 and 5 of the FOIA. The Court granted the petition in *Crooker*, vacated the judgment below, and remanded for further consideration in light of the Solicitor General's new position. 469 U.S. 926 (1984). The Solicitor General thereafter took the same position in *Lindsey* with respect to presentence reports in the possession of the Bureau of Prisons, and the Court likewise remanded that case for further consideration. 469 U.S. 1082 (1984). On remand in *Crooker*, the First Circuit proceeded on the premise that presentence reports are "agency records," rejected the Parole Commission's Exemption 3 claim, declined to consider the Commission's Exemption 5 claim because it had not been raised below, and ordered release of the report. *Crooker* v. *Parole Commission*, 760 F.2d 1 (1985). The Eleventh Circuit has not yet rendered a decision on remand in *Lindsey*.



The legislative history of the Parole Act further supports the conclusion that Congress did not intend presentence reports to be available to the public from the Parole Commission. During its floor consideration of the bill, the House of Representatives deleted a provision that would have exempted the Parole Commission from a then-recently-enacted provision of the FOIA (now embodied in 5 U.S.C. 552(a)(5)) that requires multi-member agencies to make available for public inspection a record of the votes of their members. 121 Cong. Rec. 15715 (1975). Representative Danielson stated that he would have no objection to the amendment on the understanding that "it would not make public the record examined by the Parole Board," and the House then accepted the amendment (*ibid.*). Respondents concede (Resp. to Cert. Pet. 2) that the presentence report is the primary source of information used in calculating the inmate's parole guidelines score. Representative Danielson's understanding that the "record" of a parole proceeding would not be "made public" therefore necessarily included the presentence report.[10]

3. Because the copy of a presentence report in the possession of the Parole Commission would be privileged from disclosure in civil discovery, it is protected by Exemption 5 from mandatory disclosure under the FOIA. That protection is not undermined by the fact that some courts have indicated that a litigant in a

[10] The District of Columbia Circuit observed in *Carson* v. *Department of Justice*, *supra*, that although this legislative history did not have a bearing on the question whether the Parole Commission's copy of a presentence report is an "agency record," it "is probably relevant to the question of the applicability of the FOIA's exemptions" (631 F.2d at 1015).

given case might be able to overcome a claim of privilege by making a sufficiently strong individualized showing that the ends of justice require disclosure of a particular presentence report. *Durns* v. *Bureau of Prisons*, 804 F.2d at 705; *United States* v. *Charmer Industries, Inc.*, 711 F.2d at 1173; *United States* v. *Figurski*, 545 F.2d at 391-392; *Hancock Bros.* v. *Jones*, 293 F. Supp. at 1233. The legislative history of Exemption 5 makes clear that its purpose is to ensure that "any internal memorandums which would *routinely* be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis added). "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC* v. *Grolier, Inc.*, 462 U.S. at 26 (quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 148-149 & n.16); *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 799. Even if a particular litigant might in a given case be able to obtain a copy of a presentence report upon a showing of special need, presentence reports plainly are not *routinely* or *normally* available in civil discovery on the basis of nothing more than a showing of relevance. The reports therefore are protected by Exemption 5.

### B. *The subject of a presentence report has no special right to obtain a copy of the report under the FOIA*

The court of appeals did not dispute the government's contention, based on the decisions and principles discussed above, that presentence reports are ordinarily privileged from discovery. See Pet. App. 11a-12a. However, the court held that those decisions "do not create a privilege which justifies withholding presentence reports when a FOIA request is made by the subject of the report" (*id.* at 12a). This holding fundamentally misconceives the operation of Exemption 5 and of the FOIA generally. FOIA makes documents available—or unavailable—to the public at large; it does not require an agency to "justif[y]" withholding from a particular person a document that concededly is *not* available to the public. And, in any event, there is no public policy that gives the "subject of the report" a routine right to obtain a copy; to the contrary when Fed. R. Crim. P. 32(c) was amended in 1975, this Court and Congress specifically considered the question of withholding the presentence report from the subject of the report and concluded that even he should not be given a right to obtain a copy of it.



1. The application of Exemption 5 does not depend on whether discovery would be available to the particular requester in civil litigation, but on whether it would be routinely available to an ordinary litigant. "That a particular individual with a special interest in or need for certain documents could obtain discovery of them does not mean that they are *normally* available to private parties on a showing of relevance." *Durns* v. *Bureau of Prisons*, 804 F.2d at 706 (emphasis added). See *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 802 n.20; *FTC* v. *Grolier, Inc.*, 462 U.S. at 27-28. For this reason alone, the court below erred in ruling that even though there is a privilege barring disclosure of a presentence report to a member of the general public (see Pet. App. 11a-12a), Exemption 5 of the FOIA does not permit the

Parole Commission to withhold a copy from the subject of the report.[11]

The principle that an asserted special status or interest of the requester does not afford him a unique right of access to documents under the FOIA is not confined to Exemption 5. It is a fundamental principle of the entire FOIA. The provision of the FOIA that prescribes the basic duty of disclosure states that each agency "shall make available *to the public*" the categories of information to which it applies (5 U.S.C. (& Supp. III) 552(a) (emphasis added)). See *EPA* v. *Mink*, 410 U.S. 73, 79, 92 (1973). Similarly, 5 U.S.C. 552(a)(3) requires that if the records have not already been "publish[ed]" in the Federal Register or made available for "public inspection" pursuant to 5 U.S.C. 552(a)(1) and (2), the agency "shall make the records promptly available to *any person*" upon request (emphasis added). These provisions give expression to the central premise that the FOIA "is fundamentally designed to inform the *public* about agency action and not to benefit private litigants." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 143 n.10 (emphasis added). In fact, as this Court recognized in *EPA* v. *Mink*, the FOIA was enacted in 1966 in large part for the purpose of eliminating the language in the former Section 3(c) of the Administrative Procedure Act (5 U.S.C. (1964 ed.) 1002(c)) under which information was available only to "persons properly and directly concerned" with it. See 410

[11] "[T]he use of the indefinite article in Exemption 5 (i.e., 'would not be available by law to *a* party * * *') indicates that the scope of Exemption 5 is to be determined without regard to the particular circumstances or needs of any specific actual or hypothetical party." *Brockway* v. *Department of the Air Force*, 518 F.2d 1184, 1192 n.7 (8th Cir. 1975) (emphasis in original).



U.S. at 79; H.R. Rep. 1497, 89th Cong., 2d Sess. 1, 5-6 (1966); S. Rep. 813, 89th Cong., 1st Sess. 5-6 (1965). The notion that respondents have a special right to obtain copies of their presentence reports under the FOIA because they are directly concerned with the contents of those reports is thus fundamentally at odds with the manner in which Congress structured the FOIA.[12]

The relevant question under the FOIA is always whether the document must be made available to any and all members of the public upon request. If one of the nine exemptions applies, the document may be withheld from any and all members of the public, irrespective of an asserted special status or interest of a particular member of the public. *Sears, Roebuck & Co.*, 421 U.S. at 149 n.16; *Kurzon* v. *HHS*, 649 F.2d 65, 68 n.2 (1st Cir. 1981); *Robles* v. *EPA*, 484 F.2d 843, 847 (4th Cir. 1973); K. Davis, *Administrative Law Treatise* § 5.6 (1978). Here, Exemption 5 plainly applies to the presentence reports at issue, and they may therefore be withheld under the FOIA from all members of the public, including respondents. The converse is also true: if Exemption 5 does not entitle the Parole Commission to withhold copies of presentence reports from the subjects of those reports, it does not entitle the agency to deny copies of such reports to any member of the public.

2. The court of appeals' premise—that the subject of the presentence report would have a routine right

[12] When Congress wished to confer a special right of access on the subject of a document, it did so not through the *public* disclosure provisions of the FOIA, but through the *private* disclosure provisions of the Privacy Act, 5 U.S.C. 552a(d), which is of course unavailable to respondents here. See page 9, *supra*.

to obtain a copy from the Parole Commission—was also erroneous. The court disregarded the deliberate judgment of both this Court and Congress, when Fed. R. Crim. P. 32(c) was amended in 1975, on the precise question of the manner and extent to which a presentence report should be made available to the subject of the report. That judgment followed almost 30 years of controversy over whether the defendant should even be afforded a right under the Federal Rules of Criminal Procedure to *read* the presentence report prior to his sentencing. The approach the Court and Congress adopted in 1975 manifests a clear intention to proceed cautiously and incrementally in this area by giving the defendant limited access to the contents of the report while at the same time retaining stringent controls over dissemination of copies.

a. The question of the availability of the presentence report to the defendant at the time of sentencing was thoroughly considered when Rule 32 was first adopted more than 40 years ago. In 1944, the Advisory Committee on Criminal Rules submitted to this Court a draft proposal that would have made the presentence report available to the defense and others under such conditions as the court might impose.[13] However, judges and probation officers opposed this proposal on the grounds, inter alia, that disclosure would inhibit sources of information from cooperating

[13] The proposed provision read: "After determination of the question of guilt the report shall be made available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate." Orfield, *The Federal Rules of Criminal Procedure*, 21 N.Y.L.Q. Rev. 167, 196 (1946).



with the probation officers who prepare the reports and would interfere with the rehabilitation of the defendant. Presumably because of this opposition, the disclosure provision was deleted from the Rules adopted by this Court in 1946. See Fennell & Hall, 93 Harv. L. Rev. at 1632; Note, *The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 Geo. L. J. 451, 470-471 (1970) [hereinafter *The Presentence Report*]. The effect of this deletion was to leave to the district court's discretion the decision whether, to what extent, and how the contents of the report should be disclosed to the defense. In the ensuing years, any such disclosure was typically made to defense counsel, not to the defendant personally. *United States* v. *Woody*, 567 F.2d 1353, 1358-1359 & n.10 (5th Cir.), cert. denied, 436 U.S. 908 (1978); *The Presentence Report*, 58 Geo. L. J. at 471; Junior Bar Section, D.C. Bar Ass'n, *Discovery in Federal Criminal Cases*, 33 F.R.D. 101, 122-128 (1963).[14]

[14] Judge Alexander Holtzoff stated with respect to this arrangement:

> *I don't believe of course that presentence reports should be public documents in the sense of being filed in the clerk's office and every busy body and curiosity seeker could pull them out and look at them.* I have a strong feeling however that no judicial action ought to be taken on information not available to the parties. I think a defense lawyer should know why his client for example is being sent to jail, or why he is being given a long term in the penitentiary, instead of a short term.
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> I think the rule is perfectly all right. It leaves the matter of discretion to the district judge. Whenever any counsel wants to know what is in the report I have always handed him the report.

Transcript of New York University Institute on the Federal Rules of Criminal Procedure 183-184 (Feb. 15, 1946) (em-

b. Over the next 20 years, considerable attention was given in the literature to the wisdom of disclosing information in a presentence report to the defendant at the time of sentencing, and there was again "heated controversy" on that subject prior to the adoption of the 1966 Amendments to Rule 32(c). See advisory committee's note, 39 F.R.D. 168, 193-194 (1966), and material cited.[15] A preliminary draft of an amendment to Rule 32 that was published by the Advisory Committee in 1964 would have required the court, upon request, to permit defense counsel to "read" the report (excluding material identifying sources of confidential information) prior to sentencing and to afford counsel an opportunity to comment on the report.[16] However, there was "over-

phasis added) (quoted in *Orfield, supra* note 13, 21 N.Y.L.Q. Rev. at 193 n.118).

[15] Shortly after the Criminal Rules were adopted in 1946, this Court held in *Williams* v. *New York*, 337 U.S. 241 (1949), that the Due Process Clause does not bar a court from relying at sentencing on information contained in a presentence report that was not disclosed to the defendant. The Court observed that most of the information upon which courts rely at sentencing "would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination" (*id.* at 250). But see *Gardner* v. *Florida*, 430 U.S. 349 (1977).

[16] Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure*, 34 F.R.D. 411, 438 (1964). A prior preliminary draft, published in 1962, would have required the court, upon request, to disclose a summary of material in the report (except sources of confidential information) to the defendant or his counsel. Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *First Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure*, 31 F.R.D. 669, 671, 686 (1962).



whelming opposition" to this proposal among probation officers and federal judges (Fennell & Hall, 93 Harv. L. Rev. at 1633 & n. 98; *The Presentence Report*, 58 Geo. L. J. at 471),[17] and it was not included in the Rules as finally adopted. Instead, Rule 32(c)(2) was amended to provide that the court "may disclose" some or all of the material contained in the report to the defendant or his counsel prior to sentencing. 383 U.S. 1087, 1108 (1966).[18] This rule merely codified prior practice, since the district courts already had discretion to disclose the contents of the report. *United States* v. *Woody*, 567 F.2d at 1358-1359.

c. It was not until 1975 that the Rules were amended to require that the contents of the presentence report be disclosed to the defense in some manner prior to sentencing. In that year, Rule 32(c)(3)(A) was added to provide that the court, upon request, must permit the defendant or his counsel "to read the report of the presentence investigation," exclusive of any recommendation as to sentencing and not to the extent that it would reveal any information that might disrupt a program of rehabilitation, disclose a confidential informant, or result in harm to any person. As originally adopted and transmitted to

[17] This opposition led the Judicial Conference's Committee on the Administration of the Probation System to vote unanimously against compulsory disclosure of the contents of the report. Hoffman, *What Next in Federal Criminal Rules?*, 21 Wash. & Lee L. Rev. 1, 19 & n.40 (1964). See also Wright, *Procedural Reform: Its Limitations and Its Future*, 1 Ga. L. Rev. 563, 575 (1967).

[18] Justice Douglas dissented from the Court's adoption of this permissive version of Rule 32(c)(2) and expressed the view that the Court should refer it back to the Advisory Committee "for further consideration and reflection" (383 U.S. at 1092-1093 (Douglas, J., dissenting in part)).

Congress by this Court in 1974, Rule 32(c)(3)(D) provided that any copies of the presentence report made available to the defendant, his counsel, and the attorney for the government prior to sentencing "shall be returned to the probation officer immediately following the imposition of sentence," and that copies of the report "shall not be made" by any of those persons. H.R. Doc. 93-292, 93d Cong., 2d Sess. 20-21 (1974). The advisory committee note explained that this restriction was intended "to insure that [presentence reports] do not become available to unauthorized persons" (*id.* at 71; 62 F.R.D. 271, 325 (1974)).

Congress, however, enacted into law a different version of Rule 32(c)(3)(D), which did not entirely foreclose the possibility that the defendant or the attorney for the government might be permitted to keep a copy of the presentence report in a particular case. Specifically, as enacted by Congress, Rule 32(c)(3)(D) provided that copies of the presentence report made available to the defendant, his counsel, and the attorney for the government "shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs." Pub. L. No. 94-64, § 3(34), 89 Stat. 376. The House Judiciary Committee proposed this amendment because it believed that "[t]here may be situations when it would be appropriate for either or both of the parties to retain the presentence report" and that the court should have the "discretion" to permit them to do so. H.R. Rep. 94-247, 94th Cong., 1st Sess. 18 (1975). But Congress, like this Court, expressly declined to confer on the subject of the report a *right* to keep a copy of the report.



Moreover, in 1983, this Court revisited Rule 32 but declined to alter its "sophisticated compromise" between confidentiality and disclosure (Fennell & Hall, 93 Harv. L. Rev. at 1634). Instead, although the Court revised Rule 32 in other respects, it readopted the former Rule (32)(c)(3)(D) and redesignated it as the current Rule 32(c)(3)(E). See 461 U.S. 1121, 1125-1126 (1983).[19] Congress also extensively revised Rule 32 when it enacted the Comprehensive Crime Control Act of 1984, but Congress likewise declined to alter the provision in Rule 32(c)(3)(E) that denies the defendant a right to obtain and keep his own copy of the presentence report.[20]

d. Nothing in the Parole Act suggests that Congress intended, sub silentio, to confer on a prisoner the right to obtain from the Parole Commission a copy of the presentence report that was denied to him by the sentencing court under Rule 32(c)(3)(E).

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[19] In the 1983 Amendments, Rule 32(c)(3)(A) was amended to provide that "the court shall permit the defendant *and* his counsel to read the report of the presentence investigation" and to do so even in the absence of a request by the defendant (emphasis added). The 1975 version required that either the defendant *or* his counsel be permitted to read the report upon request. These amendments reflect another incremental step in the direction of assuring that every defendant takes advantage of the opportunity to read the report. Advisory committee note, 97 F.R.D. 245, 307 (1983). But, as noted in the text, the Court did not change the requirement that those defendants who do take advantage of that opportunity must nevertheless return the presentence report to the probation officer immediately after sentencing.

[20] See Pub. L. No. 98-473, Tit. II, § 215(a), 98 Stat. 2014-2015; S. Rep. 98-225, 98th Cong., 2d Sess. 156-158 (1984). These amendments to Rule 32 take effect on November 1, 1987. Pub. L. No. 98-473, Tit. II, § 235(a)(1), 98 Stat. 2031, as amended, Pub. L. No. 99-217, § 4, 99 Stat. 1728.

To the contrary, Congress included in the Parole Act a framework for limited access to presentence reports and other materials used by the Parole Commission that is directly parallel to that in Fed. R. Crim. P. 32(c). It would have been surprising, in fact, if Congress had followed any other course, because Congress considered the Parole Act and the 1975 Amendments to Rule 32(c) at the same time, and it recognized that the Parole Commission's decision regarding release of the prisoner is essentially a continuation of the sentencing process. See page 23, *supra*. This parallel structure of Fed. R. Crim. P. 32(c) and 18 U.S.C. 4208 confirms that Congress intended the Parole Commission to exercise the same sort of control over the prisoner's access to his presentence report that a district court exercises under Rule 32(c).

The Parole Act requires that the prisoner be granted "reasonable access" to the presentence report and other documents to be relied upon by the Commission at a parole hearing. 18 U.S.C. 4208(b). Although this provision requires that the prisoner be permitted to read the report, as he would already have been permitted to do prior to sentencing under Rule 32(c), Section 4208(b) does not confer a right to obtain a copy of the report. Compare 5 U.S.C. 552a(d). From the outset, the Commission has implemented the "reasonable access" requirement by allowing the prisoner to read the presentence report but not to receive a copy of it (see page 8, *supra*; 28 C.F.R. 2.55), and since 1979, the Commission's regulations have expressly provided that a prisoner must obtain a copy of his presentence report from the sentencing court. 28 C.F.R. 2.56(b), as added by 44 Fed. Reg. 26552 (1979). The Parole Commission thus defers to the judgment of the sentencing court as to whether the prisoner will receive a copy of the report.



The Parole Commission's implementation of the "reasonable access" requirement as incorporating the Rule 32(c)(3)(E) limitation on the availability of copies of the reports is affirmatively supported by another provision of the Parole Act, 18 U.S.C. 4208(c), which exempts from disclosure under the statutory "reasonable access" provision any information that falls into one of three categories that directly parallel the categories of information that may be withheld from the defendant under Rule 32(c)(3)(A); and as under that Rule, Section 4208(c) requires that the exempt information be furnished in a summarized form. The legislative history of the Parole Act shows that this parallel to Rule 32(c) was deliberate. See H.R. Conf. Rep. 94-838, *supra*, at 29; S. Rep. 94-648, 94th Cong., 2d Sess. 29 (1976); 121 Cong. Rec. 15705 (1975) (remarks of Rep. Drinan).[21]

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[21] The nexus between the Parole Act and Rule 32(c) is further illustrated by the Senate Committee's consideration of an earlier version of the bill. See *Parole Legislation: Hearings Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d & 94th Congs., 1st & 2d Sess. (1973-1975) [hereinafter *Hearings*]. The version of the bill before the Committee in 1974 would have exempted from inspection under the "reasonable access" provision not only the three categories of information that parallel those in Rule 32(c)(3)(A), but also "any part of any presentence report, except upon agreement of the court having jurisdiction to impose sentence." *Hearings* 47; see also *id.* at 54. Chairman Sigler of the Parole Board expressed the view that "the judge has the right to say what material he has submitted to [the Parole Board] can be used" (*id.* at 66), and he was concerned that the consent provision might create delay while the Commission sought to determine whether the sentencing court would agree to permitting the defendant to

It accordingly was entirely reasonable for the Commission likewise to follow Rule 32(c) and its implementation by the courts with respect to the related aspect of disclosure at issue here—the release of a copy of the presentence report to the subject of the report. Just as the FOIA cannot be used to circumvent the restrictions on discovery of the presentence report in judicial proceedings governed by Rule 32(c)(3)(E), it cannot be used to circumvent the identical limitations on discovery in parallel administrative proceedings governed by 18 U.S.C. 4208(b) and implementing regulations. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).[22]

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review the presentence report (*id.* at 64). The Committee staff director then observed that "[t]he Judicial Conference has before it a proposal to change the rules of criminal procedure to provide that all presentence reports are made available to the defendant at the time of sentencing, which of course would take care of this problem if the Judicial Conference makes that change" (*ibid.*).

The Judicial Conference, this Court, and Congress of course thereafter did make the change to which the Committee's staff director referred. The provision in the 1974 bill that required the Commission to obtain the sentencing court's consent before allowing a prisoner to read his presentence report was then omitted from the version of the bill that the Committee reported during the next Congress. S. Rep. 94-369, 94th Cong. 1st Sess. 24 (1975). The Senate Committee apparently concluded that if the defendant will have been allowed to read the presentence report prior to sentencing under the newly amended Rule 32(c), the Parole Commission should have the authority to allow him to do so again prior to his parole hearing. Cf. *Carson* v. *Department of Justice*, 631 F.2d at 1014 n.27. This chain of events corroborates the conclusion that the "access" provisions of the Parole Act were considered by Congress with the parallel to Rule 32(c) specifically in mind.

[22] For the same reason, the court of appeals erred in holding (Pet. App. 12a n.7) that Rule 32(c) and 18 U.S.C. 4208(b)



e. The limitations on the availability of presentence reports from the Parole Commission, which respondents seek to avoid, were recently reviewed and unanimously reaffirmed by the Commission. The occasion for this assessment was a petition for rulemaking filed on March 26, 1985 by the Public Citizen Litigation Group, which proposed that the Commission order the release of copies of presentence reports to federal prisoners and other subjects of the reports on a routine basis (Pet. App. 23a).

Because of the obvious interest of the courts in this proposal, the Parole Commission solicited the views of the Administrative Office of the United States Courts (Pet. App. 24a). By letter dated June 17, 1985 (Pet. App. 24a-27a), the Chief of the Division of Probation of the Administrative Office opposed the

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constitute a "waiver" of the recognized privilege against disclosure of presentence reports. Those provisions furnish only a *limited* right of access on specific occasions that Congress and this Court determined give the subject of the report a particularized need to read it. Those provisions do not compel the disclosure of the contents of the report even to the defendant or prisoner in other circumstances. They do not constitute a "waiver" of the Commission's right to withhold a copy of the report from release to the subject of the report, much less to the public, under the FOIA.

In addition, and contrary to the court of appeals' suggestion (Pet. App. 13a-14a), it is clear that factual material is protected by Exemption 5 where, as here, that material would be privileged in civil discovery. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 800 n.17. In fact, in *EPA* v. *Mink*, *supra*, upon which the court below principally relied (Pet. App. 13a-14a), the Court discussed certain aspects of the legislative history leading up to the enactment of the FOIA in 1966 that demonstrated that Congress had rejected proposals to exclude all factual material from the coverage of Exemption 5 (410 U.S. at 91). See *Martin* v. *Office of Special Counsel*, No. 86-5385 (D.C. Cir. June 5, 1987), slip op. 8-10.

proposal. He stated that "it is the position of the Probation Committee of the Judicial Conference of the United States, as well as the Probation Division of the Administrative Office of the U.S. Courts, that permitting a defendant to keep a copy of his presentence report could likely impede the ability of U.S. probation officers to gather information and protect their sources" (*id.* at 25a).

The Administrative Office observed that "[p]resentence investigation reports contain an abundance of personal and social information about the defendant, his family and associates, and other innocent persons" (Pet. App. 25a). For these reasons, the Administrative Office explained, "[p]robation officers do now and always have assured sources of such information" that although a presentence report will be made available to the defendant, his counsel, and prosecutor to *read*, "broader access" to the information will be controlled by the court (*ibid.*). The Administrative Office then continued (*id.* at 25a, 26a-27a):

> Were a defendant permitted to retain a copy of his report, * * * there would be no way to effectively prohibit further disclosure of the information to third parties. This possibility is far more dangerous to a source of information than is the possibility of the defendant revealing his recollection of what he read in the report prior to sentencing. * * * * * [Rule 32(c)(3)(E)] embodies the concern of the courts that the defendant's retention of the presentence report is normally inimical to the interests of obtaining full and accurate information prior to sentencing.
>
> * * * * *
>
> Sources would have to be advised that a defendant would actually control the dissemination of information in the report. This realization would be of concern to all sources, particularly state and local law enforcement agencies, which, understandably, might have more confidence in the measured discretion of the court than the whims of the defendant.



The Administrative Office also observed that if the Parole Commission granted the rulemaking petition, the effect would be for the Commission "to usurp the authority granted to district judges" under Rule 32(c)(3)(E) by conferring on the subject of the presentence report a right (to retain a copy of the report) that was denied to him by the district court (Pet. App. 26a).

After receiving these comments, the Commission, adopting the views of its General Counsel, denied the rulemaking petition (Pet. App. 23a, 28a-34a). The Commission stated that it had "been given ample evidence over the years (and quite recently) that the assumption is strongly held and widely shared among the U.S. Probation Officers in the field, as well as the U.S. District Judges who listen to the point of view expressed by the Probation Service," that "permitting defendants to keep copies of their presentence reports would impede the ability of U.S. Probation Officers to gather information and protect their sources" (*id.* at 30a). In addition, based on its past experience with the courts' sensitivity on this issue, the Commission feared that if it made copies of presentence reports available to prisoners, many courts might resist furnishing presentence reports to the Commission in the future (*id.* at 31a-32a). The Commission also noted that it had achieved a "harmonious approach" to the problem by respecting the "privileged status" accorded the presentence report

by the courts (*id.* at 30a-31a), and it was confident that "fundamental fairness is hardly at stake," since a prisoner is permitted to read the report prior to his parole hearing and would not gain much by obtaining a copy of it as well (*id.* at 31a).

f. In sum, even if the court of appeals were correct that the availability of agency memorandums under FOIA Exemption 5 depends not on whether they would be routinely available to a member of the general public in litigation with the agency but on whether they would be available to a particular requester, the court's decision cannot be squared with the deliberate and repeated determination by Congress and this Court to deny the subject of the report such a right under the special discovery provisions of Rule 32(c); nor can it be squared with the considered and unanimous determination by the Parole Commission to defer to the widely shared view of the probation officers and the courts that release of copies of those reports to defendants and prisoners would undermine the probation officers' ability to obtain complete information. Those determinations pose valid obstacles to routine discovery by the subject of the report. This Court has repeatedly stressed that the FOIA cannot be utilized to circumvent limitations on discovery in this manner. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. at 801-802; *Baldrige* v. *Shapiro*, 455 U.S. 345, 360 & n.14 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242-243 (1978); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 143 n.10; *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).



## III. THE PAROLE COMMISSION ALSO MAY WITHHOLD COPIES OF RESPONDENTS' PRESENTENCE REPORTS FROM THEM UNDER EXEMPTION 3 OF THE FOIA

We have demonstrated above that the relevant question under the FOIA is whether the document in question must be disclosed to any member of the general public, not whether it should be disclosed to a particular requester who claims a special interest in or nexus to it. We also have demonstrated that respondents' claim of a special right to obtain copies of their own presentence reports is in any event flatly inconsistent with the determination by this Court and Congress to withhold that very right from the subjects of presentence reports under Fed. R. Crim. P. 32(c)(3)(E). By virtue of that specific determination by Congress, to which the Parole Commission has consistently adhered in its handling of the same reports, the presentence reports in this case are protected by Exemption 3 of the FOIA as well as Exemption 5.

Exemption 3 provides that the FOIA shall not apply to matters that are—

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, *or* (B) establishes particular criteria for withholding *or* refers to particular types of matters to be withheld[.]

5 U.S.C. 552(b)(3) (emphasis added). Presentence reports are protected by the second portion of Clause (B) of this exemption. See, *e.g.*, *CIA* v. *Sims*, 471

U.S. at 167-168.[23] This protection derives from the withholding authority in Fed. R. Crim. P. 32(c)(3)(E), which has consistently been respected by the Parole Commission.

Fed. R. Crim. P. 32(c)(3)(E) provides:

> Any copies of the presentence investigation report made available to the defendant and [his] counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

This rule satisfies all of the prerequisites for a withholding statute that are set forth in Exemption 3(B). First, the Rule was enacted into law by Congress in 1975,[24] and it therefore plainly is a "statute" within the meaning of Exemption 3. See *Fund for Constitutional Government* v. *National Archives*, 656 F.2d 856, 867 (D.C. Cir. 1981). Second, Rule 32(c)(3)(E) "refers to particular types of matters" within the meaning of Exemption 3(B). In fact, the Rule speaks with uncommon particularity, since it refers to only one "matter," copies of presentence investi-

[23] As is apparent from the language of Exemption 3, its "requirements * * * are phrased in the disjunctive." *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980); *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610, 616-617 & n.8 (9th Cir. 1978), cert. denied, 439 U.S. 1073 (1979); *De Laurentiis* v. *Haig*, 686 F.2d 192, 194 (3d Cir. 1982). Accordingly, a statute may satisfy Exemption 3 by satisfying any one of its three distinct criteria (*Long* v. *IRS*, 742 F.2d 1173, 1178-1179 (9th Cir. 1984)), including, as in *CIA* v. *Sims*, *supra*, the second portion of Clause (B) of Exemption 3.

[24] Pub. L. No. 94-64, § 3(34), 89 Stat. 376. As enacted, the provision was designated Rule 32(c)(3)(D).



gation reports. Third, Rule 32(c)(3)(E) specifies that copies of presentence reports ordinarily shall be "withheld." The Rule refers specifically only to the return of the particular copies examined prior to sentencing by the defendant, his attorney, and the government attorney, but it obviously assumes that copies would be withheld from those persosn under other circumstances and from the public at large.

If, as we contend, Rule 32(c)(3)(E) is a "statute" that "refers" with particularity to copies of presentence reports and specifies that they should ordinarily be "withheld," that specific exemption from disclosure applies to the copy acquired by the Parole Commission. Congress provided for probation officers to furnish presentence reports to the Commission (18 U.S.C. 4205(e)), and the Commission is expressly required by 18 U.S.C. 4207(3) to consider those reports in connection with its parole determinations. In the latter connection, the Commission is required by 18 U.S.C. 4208(b) to give the prisoner "reasonable access" to the presentence report, but there continues to be a statutory basis for the report to be withheld from any broader disclosure.

First, 18 U.S.C. 4208(b) is itself properly interpreted to authorize withholding of presentence reports. As noted above, the Parole Act, containing Section 4208(b), was considered at the same time as the 1975 amendments to Rule 32(c), and Congress deliberately paralleled the prisoner's right of "access" to the presentence report in connection with his parole consideration with the defendant's rights under Rule 32(c) at the earlier stage of the sentencing process. See pages 37-38, *supra*. Accordingly, the Commission has applied 18 U.S.C. 4208(b)'s requirement of "reasonable access" so as to incorporate

Rule 32(c)(3)(E)'s specific direction that copies should ordinarily be withheld, and the Commission has therefore provided by regulation that the prisoner may obtain a copy of his presentence report only from the sentencing court. See pages 36-38, *supra*.

In any event, where a statute expressly directs an agency of the government to withhold a particular document from members of the public, so that the document is exempt under Exemption 3, and a second statute provides that a second agency of the government shall consider the document under specified circumstances, it is obvious that FOIA Exemption 3 must continue to apply to the document in the hands of the second agency. Nothing in Exemption 3 limits its protection to copies in the hands of the originating agency, or the agency named in the exempting statute. Compare *FBI* v. *Abramson*, 456 U.S. 615, 628-629 (1982) (records compiled for law enforcement purposes retain their exempt status when transmitted to another agency). And such a limitation would make no sense: it would require Congress, after clearly indicating its intention that a document be withheld from disclosure, to restate that intention in connection with any required or permitted use of the document by another agency, even where there is no reason whatever to believe that Congress had any different intention. Cf. *id.* at 624-625, 628-629; *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 601 (1982). Here, the express provision of Rule 32(c)(3)(E) that copies of a presentence report be returned to the court immediately after sentencing clearly indicates Congress's intention that presentence reports not be disseminated. That clear congressional direction brings copies of such reports within Exemption 3, and nothing in



Congress's separate instructions to the Parole Commission indicates any change in that intention or removes copies of such reports from that protection.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# RESPONDENT'S

# BRIEF

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No. 86-1357

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
*Petitioners*,

v.

KENNETH MICHAEL JULIAN and MARGARET J. WALLACE,
*Respondents*.

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**On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

May the Parole Commission deny federal prisoners access to their presentence reports under the Freedom of Information Act, where the prisoners have already been permitted to read the reports in accordance with the requirements of both Rule 32(c) of the Federal Rules of Criminal Procedure and the Parole Commission and Reorganization Act of 1976?

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## BRIEF FOR THE RESPONDENTS

For the first time in the history of Freedom of Information Act litigation before this Court, the government is seeking to withhold agency records from requesters who have already been permitted, in accordance with a legislative command, to review the entire contents of the records. As we demonstrate below, neither of the FOIA exemptions relied on by the government applies to respondents' presentence reports. Moreover, the major premises underlying the government's arguments are wholly inconsistent with the position taken by the Solicitor General in 1984 in another case before the Court regarding FOIA access to presentence reports. Accordingly, the decision of the Ninth Circuit should be affirmed.

### STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions referred to in petitioners' brief, other relevant portions of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), are set forth in Addendum A.

### STATEMENT

As in any FOIA case, an analysis of the government's exemption claims requires an understanding of the nature of the requested records and of how those records are obtained and used by the agencies involved. Accordingly, after describing the presentence report itself, we will examine the two statutes that regulate its creation and use, first in the sentencing process and then during incarceration. What is most striking about these statutes is that they were both enacted to increase individuals' access to their own presentence reports—precisely the opposite of the result urged by petitioners here.

### A. Statutes Involving Access to Presentence Reports

#### 1. The Presentence Report

The presentence report has been described as "the most important document in the federal criminal process, serving as the basis for both sentencing determinations and later correctional treatment." Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1615 (1980) (hereafter "Fennell & Hall"). After a defendant has been found or has pled guilty, a presentence report is prepared by a probation officer who works for the district court. Because the "kind of evidence used in the criminal trial is related to guilt, and is often not very useful to the sentencing judge," the presentence report is intended to provide a "social background and psychological portrait of the individual," which will enable "the judge to understand the individual better before imposing sentence." McLauchlan, *Privacy and the Presentence Report*, 54 Indiana L.J. 347 (1978-1979) (hereafter "McLauchlan"). Hence, the presentence report contains a host of personal information, much of which is obtained from the defendant himself, including the defendant's prior criminal record and family and mental history, as well as information about his home and neighborhood, education, religion, interests and leisure time activities, health, employment, military service, and financial condition. Note, *The Presentence Report: An Empirical Study of its Use in the Federal Criminal Process*, 58 Geo. L.J. 451, 455 (1970) (hereafter "Empirical Study").

If a convicted defendant is incarcerated, a copy of the presentence report is automatically transmitted to the Federal Bureau of Prisons, which uses it to decide on an appropriate facility and level of security for the inmate.



*See* Schmolesky & Thorson, *The Importance of the Presentence Investigation Report After Sentencing*, 18 Crim. L. Bull. 406, 409 (1982) (hereafter "Schmolesky & Thorson"). The report is also used by the prison staff to make many decisions having a direct bearing on the prisoner's day to day life, including the design of educational and employment programs, the establishment of mail privileges, and eligibility for work-study release and furloughs. *Id.; see also* Federal Prison System, Policy Statement No. 7200.17, The Case Management System and Classification Study (1975). In essence, "information contained in the presentence report can affect practically every aspect of an inmate's confinement, from his institutional designation and custody level to his living quarters and work assignment." Schmolesky & Thorson, *supra* at 410.

A copy of the presentence report is also transmitted to the U.S. Parole Commission, where it plays a "crucial role during parole determination[s]." Fennell & Hall, *supra* at 1680. In fact, the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201 *et seq.* (the "Parole Act"), requires that the Parole Commission consider presentence reports in making parole decisions, and directs the probation officer to provide the reports to the Commission for that purpose. *Id.* at §§ 4205(e), 4207. In addition, the presentence report "serves as the primary source of information for calculating the inmate's parole guideline score," which, in turn, establishes the prisoner's eligibility for parole. *See* Fennell & Hall, *supra* at 1680.

Because of the "continuing importance of the presentence investigation report" throughout a prisoner's sentencing and incarceration, and the vital "need for accuracy in the information contained in it," Congress has mandated that the subject of the report be permitted to

review it both before and after sentencing. Schmolesky & Thorson, *supra* at 407. We now turn to those statutory directives, by reviewing first the development of Rule 32(c) and then the requirements of the Parole Act.

### 2. Rule 32(c) of the Federal Rules of Criminal Procedure

The question of whether defendants should be entitled to review their presentence reports prior to sentencing was the "subject of heated controversy" for many years. Advisory Committee Note, *Proposed Rules of Criminal Procedure* 39 F.R.D. 69, 193 (1966). While some federal judges opposed the mandatory disclosure of presentence reports, "[o]ther judges and most commentators . . . favored disclosure as a means of ensuring the accuracy of information . . . ." Fennell & Hall, *supra* at 1617-18. In 1966, Congress amended Rule 32(c) of the Fed. R. Crim. P. to provide that sentencing judges had the discretion to disclose the reports to defense attorneys and prosecutors, and the Advisory Committee on Criminal Rules "hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given a full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences." 39 F.R.D. at 194.

In 1974, the Advisory Committee again examined the issue, and determined that, despite continuing opposition from many federal judges, "[i]n the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." Advisory Committee Note, *Proposed Rules of Criminal Procedure*, 62 F.R.D. 271, 324 (1974), *quoting* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 145 (1967). The Advisory Committee noted that three "prestigious organizations"—the American Bar Association, the American Law Institute, and the National Council on Crime and Delinquency—had concluded that disclosure of the presentence report to the defense is the "best way of insuring accuracy" of the reports. 62 F.R.D. at 324-25. The Committee also found that "[e]xperience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports . . . ." *Id.* at 325.



In accordance with these views, Rule 32(c)(3)(A) was amended by Congress in 1975 to require that "[b]efore imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation . . . ." Pub. L. No. 96-64, 89 Stat. 376. The House Judiciary Committee explained that, "[s]ince the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect." H.R. Rep. No. 247, 94th Cong., 1st Sess. 18 (1975) ("1975 House Report"). The amended rule exempted from the general disclosure requirement three specific categories of information: "diagnostic opinion[s] which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise to the defendant or other persons." However, as to these three categories of information, the sentencing court was required to provide the defendant with a "summary of the factual information . . . to be relied on in determining sentence. . . ."

Finally, and most pertinent to this case, section (c)(3)(D) of the amended rule, as originally proposed, required that all copies of presentence reports be returned to the sentencing court. The apparent rationale for this requirement was to protect the defendant's privacy by ensuring that presentence reports "do not become available to unauthorized persons," 62 F.R.D. at 325, presumably through dissemination by prosecutors. However, Congress determined that the proposed provision would unnecessarily preclude defendants from retaining copies of their own presentence reports, and thus it adopted a different version of section (c)(3)(D), now designated as section (c)(3)(E), which provides for the return of the reports "unless the court, in its discretion otherwise directs." As explained by the House Judiciary Committee, "the rule should give the court the discretion . . . to permit the parties to retain their copies" of the reports. 1975 House Report at 18.

Despite the disclosure requirements imposed in 1975, the Advisory Committee and Congress again concluded, several years later, that "the nature of disclosure of the presentence investigation report under current rule 32 is insufficient to ensure accuracy of sentencing information." Advisory Committee Note, *Amendments to Rules of Criminal Procedure*, 97 F.R.D. 245, 307 (1983). In coming to this conclusion, Congress and the Advisory Committee relied heavily on the study conducted by Fennell and Hall for the Federal Judicial Center and published in the Harvard Law Review. That study concluded that some sentencing judges were failing to allow sufficient disclosure of presentence reports to both defendants and their attorneys, and that this failure "significantly reduces the likelihood that false statements will be discovered . . . ." 97 F.R.D. at 307, *citing* Fennell and Hall at



1640-49. Thus, while 55% of the judges surveyed allowed defense attorneys to take extensive notes from presentence reports, and 42% allowed them to have their own copies during sentencing, some judges continued to have a "philosophical opposition to disclosure" despite Rule 32(c)'s clear "pro-disclosure policy." *Id.* at 1642, 1646-47, 1650. The study also found that "it is clear that the sources and amount of information available to the court have not diminished significantly since the enactment of the 1975 amendment." *Id.* at 1687. Likewise, the study concluded that the vast majority of judges surveyed believed that "disclosure [to defendants] has not diminished the completeness, conciseness, accuracy, or helpfulness of the presentence reports," and that, in addition, a "significant minority of the judges . . . believe that disclosure has improved the quality of the report" by strengthening the probation officer's investigatory skills." *Id.* at 1688.

In order to solve this problem of haphazard and unequal access to presentence reports, the Advisory Committee recommended, and Congress adopted in 1983, three specific changes to Rule 32(c)(3), all designed to "assur[e] that the defendant and defense counsel have a meaningful opportunity to review the presentence report and to contest factual inaccuracies." *United States* v. *Rone*, 743 F.2d 1169, 1171 (7th Cir. 1984). Thus, under the amended rule: (1) judges were required to initiate disclosure of the report rather than await a request by the defendant; (2) disclosure to *both* the defendant *and* defense counsel was mandated in place of disclosure to only one of them; and (3) disclosure was required to be made within a reasonable period of time before sentencing. 97 F.R.D. at 307. Finally, on a point of overriding significance to the resolution of this case, the Advisory Committee made absolutely clear that nothing in Rule 32 could or should be

construed to limit dissemination of presentence reports to prisoners by the Parole Commission or the Bureau of Prisons:

> The issue of access to the presentence report at the [prison] was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission *are free to make provision for disclosure to inmates and their counsel.*

*Id.* at 309 (emphasis added).

### 3. The Parole Act of 1976

The Parole Act was enacted for the fundamental purpose of creating "fair and equitable parole procedures . . . ." H.R. Conf. Rep. No. 838, 94th Cong., 2d Sess. 19 (1976). As explained by Representative Cohen, the Act was designed to insure that "due process will be the rule rather than the exception in parole procedures. Clearly, this bill aims at eliminating the inequities in the system which have frustrated wardens, judges, and inmates for the last forty years." 121 Cong. Rec. 15706 (1975). Several of the issues targeted by Congress involved the use of presentence reports and their disclosure to incarcerated individuals. Thus, Congress both directed probation officers to provide the Parole Commission with copies of presentence reports, and required the Commission to consider the reports in making parole determinations. 18 U.S.C. §§ 4205(e), 4207. In addition, and "[m]ost importantly," Congress sought to ensure that the "information . . . upon which a parole decision is based is made available to the prisoner . . . . Disclosure of information which shall be used in making determinations goes to the essence of due process." 121 Cong. Rec. 15705 (1975)



(statement of Rep. Drinan). Accordingly, Congress expressly required that all prisoners be furnished with "reasonable access" to their presentence reports at least thirty days before any parole hearing. 18 U.S.C. § 4208(b).

Congress also created three exceptions to the disclosure requirement which parallel those found in Rule 32(c)—*i.e.*, the Commission need not disclose diagnostic opinions, material revealing sources of information obtained under a promise of confidentiality, or information which, if disclosed, might result in harm to any person. Congress also required, as it did in Rule 32(c), that, if the Commission decides to withhold such information from prisoners, it must provide them with summaries of the information. *Id.* at § 4208(c). However, Congress made it clear that it did *not* want the Parole Commission, in determining whether to withhold such information or in preparing summaries of the withheld data, to be restricted by the disclosure decisions of sentencing courts. Rather, as explained by one of the sponsors of the legislation, it was Congress' "intent . . . . that the Parole Commission make an *independent* determination on disclosure of the presentence investigation and other such reports . . . ." 121 Cong. Rec. 15705 (1975) (statement of Rep. Drinan) (emphasis added).

In addition, while Congress patterned most of the Parole Act's provisions regarding disclosure of presentence reports after those contained in Rule 32(c), it did *not* include anything similar to Rule 32(c)(3)(E)'s requirement that copies of the reports be returned to the sentencing court unless the court directs otherwise. Thus, as the government explained in its response to the petition for certiorari in *Crooker* v. *Parole Commission*, No. 83-2982 (U.S. June 18, 1984) (copies lodged with the

Court) (hereafter "*Crooker* Opp."), there is no requirement in the Parole Act "that the prisoner return copies of any documents (including the presentence report) to the Commission after being afforded 'reasonable access' to them." *Crooker* Opp. at 16 n.7.

#### 4. The Freedom of Information Act

Under the Freedom of Information Act, copies of agency records must be provided to the requester unless they fall within one of nine exemptions that were carefully crafted to "protect specified confidentiality and privacy interests." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978). These exemptions are "explicitly made exclusive . . . and must be narrowly construed." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). The statute, therefore, embodies Congress' intent to create a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . ." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Contrary to the government's suggestion, Pet. Br. at 35, the Act's disclosure requirement does not come into play only where another statute creates a specific right to obtain a particular document. Pet. Br. at 35. Rather, the FOIA itself creates a sweeping right of access to agency records and, as this Court has emphasized, "nothing in the Act should be read to 'authorize withholding of information or limit the availability of records to the public, except as specifically stated'" in the statute. *Dep't of Air Force* v. *Rose*, *supra*, 425 U.S. at 361, *quoting* 5 U.S.C. § 552(c).

Contrary to another implication of petitioners (Pet. Br. at 9, 29), the basic tenets of the FOIA apply as fully to requests for personal records as they do to other materials contained in agency files. Thus, while Exemption 6 of



the FOIA was designed to prevent third parties from obtaining records that contain "intimate details . . . which might harm the individual," H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), nothing in the law precludes individuals from obtaining their *own* records—provided, of course, that the records are not covered by one of the statute's other exemptions. As Congress expressly reaffirmed in 1984, in the course of enacting an amendment to the Privacy Act, 5 U.S.C. § 552a, "the FOIA . . . contain[s] procedures permitting individuals to seek access to records about themselves." H.R. Rep. No. 726, Part II, 98th Cong., 2d Sess. 13 (1984) ("1984 House Report").[1]

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[1] The 1984 amendment to the Privacy Act clarified that none of the exemptions to the various safeguards contained in that statute could be employed by an agency "to withhold from an individual any record which is otherwise accessible to such individual under the" FOIA. 5 U.S.C. § 552a(q)(2). As explained by Congress, the FOIA and the Privacy Act "have exemptions that differ in scope and purpose, and some information that is available [to an individual] under one law may be exempt from the other." 1984 House Report at 13. Thus, for example, the Privacy Act authorizes agencies to exempt entire "systems of records" from the access, amendment, and other provisions of that law under certain circumstances, but such records may be independently available to individuals under the FOIA. Congress resolved this seeming inconsistency by requiring "the disclosure of the maximum amount of information that [is] available under *either* law." *Id.* (emphasis in original). Accordingly, the status of respondents' presentence reports under the Privacy Act is irrelevant to this Court's review of the Ninth Circuit's decision regarding respondents' right to obtain their reports under the FOIA. However, if this Court reverses, respondents and other prisoners may seek their presentence reports under the Privacy Act, which does not contain any analogue to FOIA Exemption 5. While the Parole Commission has acted to exempt systems of records containing presentence reports from the access and other safeguards of the Privacy Act, respondents are unaware of any judicial ruling upholding the legality of that action.

### B. History of Presentence Report Litigation and the Government's Shifting Rationales for Withholding Presentence Reports Sought Under the FOIA

Because of the vital role that presentence reports play in the correctional process, federal prisoners began seeking access to them soon after the FOIA was enacted in 1966. Throughout the past two decades, the Parole Commission has advanced an assortment of arguments for withholding copies of presentence reports from prisoners who have already been permitted to see them. All of these arguments, however, flow from the Parole Commission's original position—which has since been abandoned by the Solicitor General in this Court, *see* discussion at 15-16, *infra*—that a presentence report in the possession of the Commission is not an "agency record" subject to the FOIA, but is instead a "court record" which is not covered by the statute. Thus, the Commission's longstanding opposition to release of presentence reports stems not from the Commission's policy judgment regarding the adverse effects of disclosure, but rather from the now-discredited belief that, in the words of the Commission's regulation, presentence reports are "court documents" which can only be obtained from the "appropriate [sentencing] court." 28 C.F.R. § 2.56(b); *see also Parole Legislation: Hearings Before the Subcomm. on the National Penitentiaries of the Senate Comm. on the Judiciary*, 93d & 94th Congs., 1st & 2d Sess. 131 (1973-1975) (testimony of Maurice H. Sigler, Chairman, United States Board of Parole) ("the presentence report is the property of the sentencing court").

#### 1. Litigation Over Whether Presentence Reports Are Agency Records Subject To The FOIA

In 1968, the Tenth Circuit accepted the Parole Board's position that a presentence report in the Board's possession is not an agency record because it is "made for the use of the sentencing court and thereafter remains in the exclusive control of that court . . . ." *Cook* v. *Willingham*, 400 F.2d 885. However, in light of "significant changes . . . in the law governing presentence reports," as well as this Court's decision in *Kissinger* v. *Reporters' Committee for Freedom of the Press*, 445 U.S. 136 (1980), the D.C. Circuit held that reports in the possession of the Parole Commission are agency records subject to the FOIA because they are under the Commission's sole control. *See Carson* v. *Dep't of Justice*, 631 F.2d 1008, 1011 (D.C. Cir. 1980); *Lykins* v. *Dep't of Justice*, 725 F.2d 1455 (D.C. Cir. 1984). In *Carson*, after a thorough review of the language and history of both Rule 32(c) and the Parole Act, the court reasoned that Congress "vest[ed] the Parole Commission with the requisite authority to disclose" presentence reports in its possession, and that it did not want the Commission, in providing for such disclosure, "to be bound" by the decisions of sentencing courts under Rule 32(c). 631 F.2d at 1014-15. And in *Lykins*, the D.C. Circuit rejected the government's related argument that a sentencing court can restrict the dissemination of presentence reports by issuing an order or policy statement forbidding the Commission from releasing them. Stating that it would "refuse to let in through the back door the arguments" that it had found unpersuasive in *Carson*, the D.C. Circuit concluded that the sentencing court, "whatever its policy may be[,] does not and cannot control presentence reports after it has turned them over to the Parole Commission." *Id.* at 1460, 1461.

In the wake of the rulings in *Carson* and *Lykins*, the Parole Commission attempted to convince sentencing courts that they should routinely release copies of presentence reports to prisoners. For example, the Chairman

of the Commission told the Chief Probation Officer for the District of Columbia that it "would be *good correctional policy* to have copies of these reports given to defendants at sentencing or as soon thereafter as feasible . . . ." Letter of U.S. Parole Commission Chairman Benjamin F. Baer (Sept. 9, 1982) (emphasis added) (included in Addendum B).

Subsequently, Chairman Baer urged the Chief Judge of the United States District Court for the Eastern District of Virginia—which had issued the policy statement involved in *Lykins*—to "authorize disclosure of its reports under the FOIA." Letter of U.S. Parole Commission Chairman Benjamin F. Baer at 1 (February 15, 1984) (Addendum C). He noted "that the U.S. District Court for the District of Columbia . . . now routinely permits defendants to keep copies of the disclosable parts of their presentence reports, *with no reported adverse consequences*." *Id.* (emphasis added). He also stated that "we see no point in asserting any exemptions under the FOIA" because the requirement that presentence reports be shown to defendants "would seem to remove any real reason against letting the defendant obtain a copy." *Id.* at 1-2. Chairman Baer further explained that, "[i]n cases where there is confidential information which is not to be shown to the defendant . . . such material will be protected from disclosure under the FOIA as well . . . Third party access under the FOIA would also not be available . . . ." *Id.* at 2. He concluded that providing copies of presentence reports "which are already disclosable to the defendant under Rule 32" would entail no "threat to the willingness of confidential sources to come forward . . . ." *Id.*; *compare* Pet. Br. at 39-42.

Despite its determination that copies of presentence reports should routinely be given to prisoners, the Parole



Commission did not abandon its litigation position that the reports belong to sentencing courts and cannot be released under the FOIA if a sentencing court opposes disclosure. Instead, the Commission continued to advance its argument that presentence reports are court records, and it also contended, in the alternative, that presentence reports may be withheld in their entirety under Exemption 3 of the FOIA, which authorizes agencies to withhold records that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3).

In *Crooker* v. *United States Parole Commission*, 730 F.2d 1 (1984), the Commission convinced the First Circuit to part company with the D.C. Circuit and to rule that presentence reports in the possession of the Parole Commission are court records that are not subject to the FOIA. However, in response to the prisoner's petition for certiorari in *Crooker*, the Commission reversed the position that it had held for over fifteen years, and conceded that presentence reports *are* agency records subject to the FOIA. *Crooker* Opp. at 6-7. Citing the same provisions of the Parole Act on which the prisoner-requesters had relied in *Carson*, *Lykins*, and *Crooker*, the Commission acknowledged that it has control over the presentence reports in its possession, largely because it is required to give prisoners access to their reports prior to parole hearings. *Id.* at 9-10. In addition, the Commission explained that the Parole Act "does not grant the sentencing court authority to determine whether and in what manner the prisoner will be afforded that right of access," and it acknowledged that the Parole Act itself "does not prohibit the Commission from furnishing the prisoner with a copy of the report." *Id.* at 11, 17.

Furthermore, the government represented to this Court that Fed. R. Crim. P. 32 "does not speak" to

whether the Parole Commission can give prisoners copies of their presentence reports, and thus the Solicitor General concluded that the "Bureau of Prisons and Parole Commission are free to make provision for disclosure to inmates and their counsel." *Crooker* Opp. at 15, *quoting* 97 F.R.D. 245, 309 (1983). Finally, the Solicitor General flatly admitted that Congress did *not* intend to prevent the Parole Commission from giving prisoners copies of the reports to keep, nor did it require the Commission to abide by the disclosure decisions of sentencing courts. *Id.* at 16 n.7. However, while acknowledging that Congress did not want sentencing courts to control the dissemination of presentence reports to prisoners, the Parole Commission conceded that its historical "practice" has been to allow precisely that kind of control by "defer[ring] to the determination made by the [sentencing] court . . . with regard to whether the prisoner may have a copy" of the report. *Id.* at 17.[2] Over the government's objection, this Court granted the petition for certiorari, summarily vacated the First Circuit's decision, and remanded the case for "further consideration in light of the Solicitor General's present interpretation" of Rule 32(c). 469 U.S. 926 (1984).

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[2] The Commission's practice regarding presentence reports is well-illustrated by its treatment of one of the FOIA requests at issue in *Durns* v. *Bureau of Prisons*, 804 F.2d 701 (D.C. Cir. 1986), *petition for cert. filed* (U.S. March 17, 1987) (No. 86-6550). In response to a request made by Eugene John Izzi for three presentence reports written about him, the Commission did not assert Exemptions 3 and 5 to withhold all of the reports. Rather, it gave him copies of two presentence reports that were prepared by the probation service in the Northern District of Indiana, but it refused to release another, similar report simply because the District Court in Puerto Rico, where the report was prepared, opposed its disclosure.



**2. Litigation Over Whether Presentence Reports Are Covered By Exemptions To The FOIA**

On remand in *Crooker*, the First Circuit rejected the Commission's Exemption 3 argument—that another statute requires the withholding of presentence reports—on the grounds that neither the Parole Act nor Rule 32 bars the Commission from releasing copies of presentence reports, except for the three specific categories of information that the Parole Act authorizes the Commission to keep confidential. *Crooker* v. *United States Parole Commission*, 760 F.2d 1, 3 (1985) *(Crooker II)*. Hence, the court ordered the Commission to release the presentence report at issue. Moreover, in deciding to award attorneys' fees to the plaintiff in that case, the First Circuit expressly found that the release of presentence reports to their subjects "should benefit the public because it may 'increase the accuracy of [the] reports, and improve the correctional decision making process.'" *Crooker* v. *United States Parole Commission*, 776 F.2d 336, 368 (1st Cir. 1985) *(Crooker III)*, *quoting Berry* v. *Dep't of Justice*, 733 F.2d 1343, 1356 (9th Cir. 1984).

Despite its about-face on the "agency records" issue in *Crooker*, and the rejection of its Exemption 3 claim by the First Circuit, the Commission continued to defer to sentencing courts' claims of control over presentence reports, and refused to release copies of the reports whenever sentencing judges and probation officers opposed disclosure. Thus, the Commission continued to assert Exemption 3, and also added a claim under Exemption 5, which allows agencies to withhold "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Both exemption claims were rejected—as only slight variations on the Commis-

sion's "agency records" argument—by every district court to consider them, including six different district judges in nine separate cases in the D.C. Circuit, two district judges in the Third Circuit, and, in the cases now before the Court, two district judges in the Ninth Circuit. However, in a divided ruling, a panel of the D.C. Circuit disagreed with all of these courts. While it did not reach the Commission's Exemption 3 claim, characterizing it as "less substantial," the Court upheld the Commission's contention that all presentence reports may be withheld in their entirety under Exemption 5. *Durns* v. *Bureau of Prisons*, 804 F.2d 701, 702 n.1 (1986).

Citing this Court's decisions in *FTC* v. *Grolier, Inc.*, 462 U.S. 19 (1983), and *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984), the D.C. Circuit ruled that, because presentence reports are not "routinely available" to *third parties* (usually co-defendants) in criminal cases, they can also be withheld from the prisoners themselves under Exemption 5. 804 F.2d at 704. In dissent, Senior Judge Skelly Wright argued that the majority had created a "vastly expanded Exemption 5 rubric," and that neither *Grolier* nor *Weber* "remotely resembles the present situation," in which prisoners actually have a "statutory *entitlement* to access." *Id.* at 706-08 (emphasis in original). By a 6-5 vote (with Senior Judge Wright not voting), the full D.C. Circuit denied the prisoners' petition for rehearing *en banc*. In dissenting from the denial of rehearing, Chief Judge Wald, joined by three other members of the Court, stated that the panel decision "badly needs reconsideration," and described the panel's rationale for invoking Exemption 5 as "almost a parody of legal formalism. . . ." 806 F.2d 1122, 1124. On March 17, 1987, the prisoner-requesters filed a petition for certiorari in *Durns*, which is still pending (No. 86-6550).



While *Durns* was being litigated, respondents Kenneth Michael Julian and Margaret Wallace filed their cases under the FOIA in the United States District Courts for the District of Arizona and the Northern District of California. They both prevailed in district court, and the government's appeals were consolidated by the Ninth Circuit. One week after the denial of rehearing in *Durns*, a unanimous panel of the Ninth Circuit agreed with the First Circuit and the ten district judges who had rejected the Parole Commission's exemption claims. Pet. App. 2a. With respect to the government's Exemption 3 claim, Judge Beezer, writing for himself and Judges Wallace and Alarcon, reasoned that Rule 32(c) and the Parole Act do not "establish complete exemptions" because they generally "require disclosure to the defendant and his attorney" prior to sentencing and parole hearings. App. 8a.

With respect to the Parole Commission's Exemption 5 claim, the Ninth Circuit came to an "opposite conclusion" from the D.C. Circuit, finding that the government had "failed to identify an existing statutory or common law privilege that exempts presentence reports from discovery" by the subjects of the reports. App. 10a. Moreover, the court noted, even if there were such a privilege, it has been waived by Congress because both Rule 32 and the Parole Act require the disclosure of presentence reports to their subjects. *Id.* at 12a n.7. The Solicitor General then petitioned for review, and respondents agreed that review by this Court is appropriate because of the conflict in the circuits.[3]

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[3] In addition to *Durns*, other cases raising the same issue are pending in the Third Circuit, *Morgan* v. *Miller*, No. 86-5612, and *Frankenberry* v. *Dep't of Justice*, No. 5725 (argued Feb. 24, 1987), and the Eleventh Circuit, *Scott* v. *Parole Comm'n*, No. 83-8805.

## SUMMARY OF ARGUMENT

Although the government concedes that respondents may review and even take notes on the contents of their presentence reports, it nevertheless insists that they cannot obtain copies of the reports under the Freedom of Information Act. This position is contrary to the FOIA, rulings of this Court construing the Act, and representations recently made by the Solicitor General in presentence report litigation before this Court. Under the FOIA, requesters have a right to obtain copies of agency records unless the agency can establish that the records are covered by one of the specific exemptions enumerated in the statute. In this case, the government cannot demonstrate that copies of presentence reports that have already been read in their entirety by the requesters can be withheld from those requesters under either Exemption 3 or Exemption 5 of the FOIA.

In response to this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1976), Congress amended Exemption 3 in 1976 in order to ensure that agencies do not withhold records under statutory schemes that give the agencies the authority to disclose the records. Part B of the exemption, on which petitioners rely, allows an agency to withhold a record where another statute enumerates "particular types of materials *to be withheld*" by the agency. 5 U.S.C. § 552(b)(3)(B) (emphasis added). However, neither of the two statutes involved here directs the Parole Commission to withhold copies of presentence reports from their subjects. On the contrary, both statutes require *disclosure* of the reports to the individuals about whom they are written.

Thus, Fed. R. Crim. P. 32(c) requires that sentencing courts disclose presentence reports to prisoners prior to sentencing, and the Commission has conceded to this



Court, as it must, that the rule in no way prohibits it from giving copies of the reports to prisoners. Similarly, except for three specific types of materials that are contained in some presentence reports, but are not involved in this case, the Parole Act requires the Commission to disclose presentence reports to prisoners prior to all parole determinations. Moreover, in crafting the disclosure provisions of that Act, Congress decided not to include any restrictions on a prisoner's ability to retain a copy of his report and thus, as the Solicitor General conceded in *Crooker*, the Parole Commission has unfettered authority to allow prisoners to keep copies of their reports. Therefore, the government's argument that Exemption 3 allows it to withhold the reports flies in the face of the plain language of the exemption, as well as Congress' reason for amending it in 1976.

The government's Exemption 5 claim is also contrary to the FOIA's language, legislative history, and judicial construction. First, the exemption applies only to "intra-agency or inter-agency memoranda," 5 U.S.C. § 552(b)(5), and petitioners have failed to explain how this category of documents encompasses reports that are prepared by non-agency personnel (*i.e.*, probation officers), used in sentencing decisions by judges (who are not agency officials), and subsequently transmitted to the Bureau of Prisons and the Parole Commission. Second, Exemption 5 only protects memoranda which are not ordinarily available to "a party . . . in litigation with the agency," yet petitioners cannot point to a single lawsuit in which the Parole Commission has ever maintained that presentence reports are privileged from discovery by anyone, let alone the subjects of the reports.

Third, even if petitioners could demonstrate that there is a presentence report privilege in litigation involving the

Commission, such a privilege could not conceivably apply to subjects of the reports who have a statutory right of access to them. Rather, any such privilege would have to be designed to bar other individuals from invading the privacy of the subjects of the reports. Thus, in arguing that a discovery privilege created to prevent access by third parties may be converted into an Exemption 5 barrier against disclosure to the subjects themselves—the very persons such a privilege would be intended to protect—the government seeks an expansion of Exemption 5 far beyond anything that this Court has previously approved. In addition, the government's approach would eviscerate the role that Congress reserved for Exemption 6 of the FOIA, which allows an agency to withhold records in order to protect a person's privacy. Finally, the government's Exemption 5 claim runs counter to another basic tenet of both the FOIA and civil discovery—that where the contents of a document have already been disclosed, as occurred here, the agency has waived its right to assert a privilege against disclosure.

In advancing their exemption claims, therefore, petitioners are plainly struggling to force a square peg into a round hole—or, more accurately, two round holes. Furthermore, this contortion of the FOIA's exemptions cannot be justified on the grounds that there is some overriding policy that necessitates withholding respondents' presentence reports. To the contrary, the Parole Commission itself has stated that no problems are caused by the release of presentence reports to individuals who have already read the reports on several occasions, as occurred here, and it has even told courts and probation officers that it would be good correctional policy for them to give defendants copies of the reports prior to sentencing. At bottom, this Court should not, as the government



requests, expand the FOIA's exemptions in ways that are wholly unprecedented and clearly contrary to Congress' intent simply to accommodate the Parole Commission's historical practice of allowing sentencing courts to control its dissemination of presentence reports.

## ARGUMENT

### THE DECISION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED BECAUSE THERE ARE NO FOIA EXEMPTIONS WHICH APPLY TO RESPONDENTS' PRESENTENCE REPORTS

The government argues that copies of respondents' presentence reports may be withheld under both Exemptions 3 and 5 of the FOIA, despite the fact that respondents have already reviewed these reports in their entirety on at least two occasions. As we now demonstrate, neither of these arguments has merit, and both are flatly inconsistent with representations that the Commission made to this Court in *Crooker*. While the government has devoted the lion's share of its brief to its Exemption 5 claim, the core argument underlying both of its claims is that Congress, in enacting the Parole Act and Rule 32(c), has indicated that it does not want copies of presentence reports to be released to prisoners. *See* Pet. Br. at 22-26, 32-38. Because the flaws in this argument can most readily be demonstrated in the context of Exemption 3, we turn to that exemption first.

#### A. There Is No Exemption 3 Statute Which Allows The Commission to Withhold Respondents' Presentence Reports.

Exemption 3 of the FOIA permits agencies to withhold records that are

> specifically exempted from disclosure by statute provided that such statute (A) requires that the matter

> be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of materials to be withheld.

5 U.S.C. § 552(b)(3). Congress amended the exemption in 1976 to overturn a decision of this Court that had construed the exemption broadly, finding that it incorporated all "laws then extant allowing confidentiality." *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 266 (1975). Thus, Congress was determined to prevent agencies from relying on statutes that simply give agencies the discretion to disclose records as a rationale for withholding the records under the FOIA. *See American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978). Accordingly, Exemption 3 now applies only to "explicit *nondisclosure* statutes that evidence a Congressional determination that certain materials ought to be kept in confidence . . . ." *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979) (emphasis added).

In this case, petitioners rely solely on subpart (B) of Exemption 3. In order to qualify for this part of the exemption, "[i]t is of course not enough that the statute refer to particular records: it must 'refer[] to particular types of matters *to be withheld*.'" *Reporters' Committee for Freedom of the Press* v. *Dep't of Justice*, 816 F.2d 730, 737 n.9 (D.C. Cir. 1987) (emphasis in original), *quoting* 5 U.S.C. § 552(b)(3)(B). Petitioners contend that both Rule 32(c) and the Parole Act satisfy this standard because these statutes suggest that copies of presentence reports should not be given to prisoners. This argument, however, is flatly contrary to the language and history of the provisions at issue. Thus, while we agree with the First and Ninth Circuits that Exemption 3(B) *does* apply to the three categories of information which may be withheld



from prisoners under the specific terms of the Parole Act, *i.e.*, confidential sources, diagnostic opinions, and other information which may cause harm to the defendant or third parties, it is just as obvious that the remaining portions of presentence reports, which are at issue here, are not covered by the exemption. As we demonstrate below, Rule 32(c) and the Parole Act simply do not authorize petitioners to withhold these nonconfidential portions of presentence reports from their subjects.

**1. Rule 32(c) Does Not Authorize Petitioners to Withhold Respondents' Reports.**

Contradicting representations that they made to this Court in *Crooker*, petitioners continue to argue that Fed. R. Crim. P. 32(c)(3)(E), which gives *sentencing courts* the discretion to *release* copies of presentence reports, sets forth a "specific exemption from disclosure [which] applies to the copy of [the presentence report] acquired by the Parole Commission." Pet. Br. at 45. As the Parole Commission admitted in *Crooker*, however, and as respondents' recitation of the history of Rule 32 reveals, the Rule was amended in both 1975 and 1983 in order to *increase* disclosure of presentence reports to both defendants and their attorneys. The Advisory Committee notes and legislative statements accompanying both amendments strongly favor disclosure of the reports, and they contain not a hint that judges should refrain from giving copies to defendants. Indeed, as the Commission also noted in *Crooker*, Congress modified the Advisory Committee's version of Rule 32(c)(3)(E) in 1975 for the express purpose of authorizing sentencing courts to release copies of presentence reports to defendants. *Crooker* Op. at 16 n.7. It is difficult to understand, therefore, how the government can now contend that Rule 32(c) constitutes a *nondisclosure* statute which "refers to particular types of

matters to be *withheld*," Pet. Br. at 43 (emphasis added), except for the three specific items which are not at issue here.

Moreover, the Commission's argument regarding Rule 32(c) is functionally identical to its prior contention—which it supposedly abandoned in *Crooker*—that presentence reports are under the continuing control of sentencing courts. Thus, in arguing that the provisions of Rule 32(c)(3)(E) "must continue to apply to the document in the hands of the" Parole Commission, Pet, Br. at 46, the Commission is obviously maintaining, once again, that Congress wanted it to abide by the disclosure decisions of sentencing courts. *See also* Pet. Br. at 36 ("Congress intended the Parole Commission to exercise the same sort of control over the prisoner's access to his presentence report that a district court exercises under Rule 32(c)"). But that precise argument was rejected in the context of the government's "agency records" argument, and eventually abandoned by the Solicitor General himself.

Thus, in *Carson*, the D.C. Circuit found that Congress did *not* intend the Commission "to be bound" by the disclosure decisions of sentencing courts; to the contrary, Congress wanted the Commission to exercise "independent control" and decision making regarding the release of presentence reports. 631 F.2d at 1013-14. Proof of this intent is reflected in the fact that, although Congress exempted from the Parole Act's disclosure requirement the same three categories of information specified in Rule 32(c), it did not, contrary to the government's suggestion, Pet. Br. at 37, want the Parole Commission to be tied to the sentencing court's application of these exemptions. *See* 121 Cong. Rec. 15705 (1975) (statement of Rep. Drinan) ("It is the intent of the committee that the Parole Commission make an *independent* determination on disclosure of the presentence investigation and other such reports based upon the guidelines contained in this bill.") (emphasis added).



Congress' intent is even more powerfully demonstrated by its decision not to adopt an analogue to Rule 32(c)(3)(E) in the Parole Act; there is nothing in that statute which requires that copies of presentence reports be returned to the Commission after they are shown to prisoners, or which even intimates that the Commission should adopt such a requirement on its own. Thus, while petitioners assert that Congress, in crafting the Parole Act, "paralleled" the provisions of Rule 32(c), Pet. Br. at 45, they neglect to point out that the one provision which Congress did *not* include in the Act is the one on which they rely for both of their exemption claims. Since Congress borrowed every relevant aspect of Rule 32(c) except the provision regulating the return of presentence reports to sentencing courts, the necessary conclusion is that Congress did not want that Rule to inhibit the Commission's release of presentence reports. In view of Congress' deliberate decision to incorporate only some of the requirements of Rule 32(c) into the Parole Act, the Court cannot, as petitioners urge, "assume[] that Congress intended to authorize by implication additional" limitations on disclosure of presentence reports, particularly those set forth in Rule 32(c)(3)(E). *See Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981); *cf. Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it"); *American Methyl Corp.* v. *EPA*, 749 F.2d 826, 835-36 (D.C. Cir. 1984), *quoting* E. Crawford, *The Construction of Statutes* § 195, at 334

(1940) (a basic "maxim" of statutory construction is that the "'mention of one thing implies exclusion of another thing'").

The government also fails to mention that, in *Crooker*, it concurred with this very analysis regarding the relevance (or, more accurately, the lack of relevance) of Rule 32(c)(3)(E) to this dispute. As noted earlier, the government told this Court that, under the Parole Act, there is no "requirement that the prisoner return copies of any documents (including the presentence report) to the Commission after being afforded 'reasonable access' to them." *Crooker* Opp. at 16, n.7. The government also admitted that it has the "discretion" to give prisoners copies of presentence reports to keep. *Id.* Finally, and most importantly, the Commission even highlighted the 1983 Advisory Committee Note on Rule 32, which emphasized that the Rule "*does not speak to this issue* [of access to presentence reports that have been given to federal agencies], and thus the Bureau of Prisons and the Parole Commission are *free to make provision for disclosure to inmates and their counsel.*" *Crooker* Opp. at 15, *quoting* 97 F.R.D. 245, 309 (1983) (emphasis added). Therefore, insofar as Rule 32(c) is concerned, that statement must end the Exemption 3 analysis; since the Rule does not prescribe presentence reports as "matters to be withheld" by the Parole Commission, it does not come within the plain language of Exemption 3(B). 5 U.S.C. § 552(b)(3)(B).

**2. The Parole Act Does Not Enable Petitioners To Withhold Respondents' Reports.**

In support of their argument that the Parole Act itself is an Exemption 3 statute, petitioners rely on section 4208(b) of the Act. But that section, even more than Rule 32(c), is an affirmative *disclosure* provision, which



requires the Commission to give prisoners access to their presentence reports before parole hearings. The relevant legislative history leaves no doubt that Congress was attempting to ensure prisoners' access to their presentence reports so that they could fully and effectively participate in parole hearings; in contrast, there is not a stitch of evidence in either the statute or the legislative history which suggests that Congress wanted the provisions of the Parole Act to be used as a basis for *preventing* prisoners from obtaining copies of their reports. *See, e.g.*, 121 Cong. Rec. 15705 (1975) (statement of Rep. Drinan) ("[m]ost importantly, this information which shall constitute the factors upon which a parole decision is based, is made available to the prisoner"); 121 Cong. Rec. 15705 (statement of Rep. Coughlin) ("one of the most important reforms in this bill would ensure that prisoners are no longer subjected to parole decisions based on information to which they are denied access. H.R. 5727 would require that any files used in the parole proceedings must be made available to the inmate with few exceptions.") Certainly, Congress' effort to guarantee that prisoners would have access to their presentence reports before parole hearings cannot reasonably be read as an effort to foreclose their access to the reports under the FOIA. *See Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1286 (D.C. Cir. 1983) (a statutory provision which was "designed solely to ensure public access to summaries" of health and safety data does not provide an "independent basis for nondisclosure of otherwise unprotected health and safety information" under Exemption 3).[4]

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[4] Petitioners rely on a statement by Representative Danielson that it was his understanding that the Parole Act "would not make public the record examined by the Parole Board . . . ." 121 Cong. Rec. 15715 (1975). Pet. Br. at 25. However, aside from the fact that this statement

Once again, the government's argument here contradicts its statements in *Crooker*, in which it acknowledged that the Parole Act "does not bar [it] from giving the prisoner a copy of his presentence report," and thus it "has discretion . . . to furnish [prisoners] with copies" of presentence reports to keep. *Crooker* Opp. at 16. Indeed, on remand from this Court, the First Circuit expressly relied on these statements to conclude that the Parole Act grants the Parole Commission the "power to furnish defendants with copies of their presentence reports." *Crooker II*, 760 F.2d at 2. It concluded, therefore, that the Act cannot qualify as a mandatory withholding statute under Exemption 3. *Id.*

The First Circuit also rejected the government's argument, advanced again in this case, that the Parole Act specifically qualifies under subsection (B) of Exemption 3. As that court correctly recognized, Congress identified in section 4208(c) of the Parole Act only three particular types of matters in presentence reports that can be withheld, *i.e.*, potentially disruptive diagnostic opinions, information which would disclose confidential sources of data, or other information which, if disclosed, would be harmful to the subject of the report or some other person. 760 F.2d at 3; *see also Berry* v. *Dep't of Justice*, *supra*, 733 F.2d at 1354. Thus, Exemption 3(B) applies to these three categories of information because they reflect Congress'

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does not even mention presentence reports, it is not the least bit inconsistent with the notion that prisoners can obtain their own reports under the FOIA. As we will later explain in greater detail, it is clear that the vast majority of presentence reports—like all highly personal records in the possession of the government—can properly be withheld from the public at large under Exemption 6 of the FOIA. *See infra* at 41. In all likelihood, Representative Danielson was simply stating that proposition.



"appreciation of the dangers inherent in airing particular data and incorporate a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." *American Jewish Congress* v. *Kreps*, *supra*, 574 F.2d at 628-29.

Just as clearly, information contained in presentence reports that does not fall within these categories "does not 'pose the hazard' against which Congress sought to protect; the information thus would not fall within exemption 3." *Crooker II*, 760 F.2d at 3, *quoting American Jewish Congress* v. *Kreps*, *supra*, 574 F.2d at 629. Indeed, far from suggesting that Congress envisioned dangers in the general disclosure of presentence reports, as the government suggests, the Parole Act reflects Congress' policy judgment that, except for the three specific categories explicitly excluded, prisoners should be afforded full access to their reports. Therefore, the Act generally treats presentence reports as "matters to be *disclosed*, not withheld, and the Commission has failed to demonstrate how its Exemption 3 claim can be reconciled with the plain language" of the Act. *Crooker II*, 760 F.2d at 3 (emphasis in original).

Overall, it is evident that the statutes relied on by petitioners to support their Exemption 3 claim—Rule 32(c) and the Parole Act—do not circumscribe the discretion of the Parole Commission and the Bureau of Prisons to release copies of presentence reports to prisoners in response to FOIA requests, and thus they are no different from the statute that was reviewed by this Court in *Robertson* and which triggered Congress' tightening of Exemption 3 in 1976. In essence, therefore, the Court can sustain petitioners' Exemption 3 claim only by turning

the legislative clock back to the days before Congress amended Exemption 3 by overruling *Robertson*.

### 3. The Commission's Refusal To Release The Reports Undermines Congress' Scheme.

Finally, while the foregoing establishes that petitioners have not satisfied the rigorous requirements for Exemption 3 coverage, it is also important to dispel an erroneous impression created by petitioners' brief. Petitioners imply that there is some fundamental irrationality in a legislative scheme in which Rule 32(c)(3)(E) does not apply to the Parole Commission, and that this Court should rectify this defect by unilaterally "incorporating [into its implementation of the Parole Act] the Rule 32(c)(3)(E) limitation on the availability of copies of the reports. . . ."—in other words, allow sentencing courts to continue to control whether the Commission will honor its statutory obligations under the FOIA. Pet. Br. at 37; *see also Crooker* Opp. at 17.

But Congress' scheme is perfectly sensible as written and requires no judicial reworking. As the history of Rule 32 and the Parole Act make clear, Congress determined that sentencing courts may exercise some control over the degree and type of disclosure before and during the sentencing process. This allows the courts to ensure that the sentencing process runs smoothly and is not plagued by "serious delays. . . ." *See* Empirical Study at 472; *see also Williams* v. *New York*, 337 U.S. 241, 252 (1949). By the same token, Congress also determined that, once the sentencing process is complete, courts and probation officers should not exercise continuing control over disclosure of presentence reports; rather, the relevant federal agencies should make disclosure decisions in



accordance with the Parole Act and other applicable federal statutes, such as the FOIA and the Privacy Act.

At bottom, the Parole Commission's continued deference to the disclosure decisions of sentencing courts is not only unjustified, but it actually undermines the legislative scheme crafted by Congress in the Parole Act. In addition to guaranteeing that prisoners would have access to their presentence reports before parole hearings, the Parole Act was generally aimed at "eliminating the inequities in the system which have frustrated wardens, judges, and inmates for the last 40 years." 121 Cong. Rec. 15706 (1975) (Statement of Rep. Cohen); *see also* 121 Cong. Rec. 15709 (1975) (Statement of Rep. Pattison) ("[t]he major benefit that H.R. 5727 confers is that of order and a real measure of certainty, to prisoners, administrators, and sentencing judges").

Under the Parole Commission's approach, however, only some prisoners are given copies of their presentence reports by the Commission—those whose sentencing judges do not object—and thus are able to understand and participate in the many crucial "decisions concerning custody and program eligibility based on information in the presentence report [that] already will have occurred by the time of the first parole hearing." Schmolesky and Thorson, *supra* at 425. Their cell mates, however, may be denied the same access to their own reports—simply because their sentencing judges continue to have a "philosophical objection" to disclosure—and thus are put at a severe disadvantage in comprehending and influencing these same crucial determinations. The government's Exemption 3 argument, therefore, is not only incompatible with the clear mandate of the FOIA, but it also runs counter to the purposes of the Parole Act, because it

perpetuates precisely the kind of inequity and arbitrariness which Congress was trying to eliminate.

### B. Presentence Reports Cannot Be Withheld Under Exemption 5 of the FOIA.

The government contends that all presentence reports, including those which have already been reviewed in their entirety by the requesters, are subject to Exemption 5 of the FOIA, which allows agencies to withhold "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). In advancing this argument, the government asks this Court to reject the reasoning of Judges Beezer, Wallace, Alarcon, Wright, and Wald, as well as the ten district judges who found the government's Exemption 5 claim to be without merit, and instead to follow the D.C. Circuit's split decision in *Durns*, *supra*. As we demonstrate below, however, the approach to Exemption 5 taken in *Durns* expands the exemption to such an extent that it effectively displaces Exemption 6 of the FOIA, and inevitably leads to an anomaly which Congress could not have intended—barring individuals from gaining access to their own files on the basis of discovery privileges that were created for the sole purpose of protecting the privacy of those same individuals.

#### 1. Presentence Reports Are Not Intra- Or Inter-Agency Memoranda That Are Privileged In Litigation Involving The Parole Commission.

At the outset, while the Ninth Circuit did not focus on Exemption 5's threshold requirement, respondents fail to see how presentence reports can be characterized as "inter-agency or intra-agency memorandums . . . ." 5 U.S.C. § 552(b)(5). Congress could have applied Exemption 5 to *all* agency records covered by the FOIA, but



chose to restrict it to documents which "an agency [itself] puts in writing." Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1048-49 (1973). Presentence reports, which are created by non-agency personnel (probation officers), for the use of other non-agency personnel (judges), and subsequently transmitted to agencies (the Bureau of Prisons and Parole Commission), cannot be deemed intra- or inter-agency memoranda without "pervert[ing] both the language and the purpose" of Exemption 5. *Durns* v. *Bureau of Prisons*, 806 F.2d 1122 (D.C. Cir. 1986) (statement dissenting from denial of rehearing *en banc*).

Even if the government can overcome Exemption 5's threshold hurdle, however, its argument still runs afoul of the statute's plain language. Exemption 5 applies only to documents that are not generally available "to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). However, the agencies at issue here—the Parole Commission and Bureau of Prisons—do not, and cannot, cite a single case in which they have even asserted that a presentence report was privileged from civil discovery, let alone a case where such a claim was upheld. Instead, defendants rely exclusively on cases in which courts, in criminal cases in which neither agency was a party, have restricted access to presentence reports. To suggest that such cases support an Exemption 5 claim, which requires a showing that requested records are not generally available in "litigation *with the agency*," is, once again, nothing less than an attempt to rewrite the plain language of the exemption.[5]

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[5] The government attempts to overcome this problem by arguing that Congress must have intended the "status of presentence reports to be identical in the two settings" and thus restrictions on disclosure

**2. Any Presentence Report Privilege That May Exist Is Limited to Third Party Requesters.**

Even if the Court could discern some presentence report privilege that applies or would apply in litigation involving the Parole Commission, the government's Exemption 5 claim must still fail. As noted in the dissenting opinion in *Durns*, "[e]ven brief examination reveals" that Rule 32(c) does "not create a civil discovery privilege against disclosure of a presentence report to its *subject*." 804 F.2d at 707 (emphasis in original). Indeed, as the opinion went on to point out, and, as the government admits, Rule 32(c) and the Parole Act actually give prisoners a "statutory *entitlement* to access" to the reports. *Id.* (emphasis in original); *see also United States* v. *Rone*, 743 F.2d 1169, 1172 (7th Cir. 1984); *Carson*, *supra*, 631 F.2d at 1012-13. Thus, unlike the situations presented in *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984), and *FTC* v. *Grolier*, 462 U.S. 19 (1983), on which the government and the majority in the D.C. Circuit placed primary reliance, prisoners need not show any "particularized" or "substantial" need in order to secure assess to their reports; to the contrary, "the agency effec-

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in the criminal context are necessarily transferrable to civil litigation involving the Parole Commission. Pet. Br. at 42. But as we explained earlier, and as petitioners admitted in *Crooker*, Congress intentionally chose, in adopting the Parole Act, *not* to apply to the Parole Commission the same limitations on the release of presentence reports that are applicable in the criminal arena. Moreover, in arguing that the rules applied by judges in criminal cases automatically restrict the Commission's dissemination of presentence reports, petitioners make it clear that their Exemption 5 argument is essentially identical to the argument as to which they confessed error in *Crooker*—that the control exercised by courts over presentence reports governs the Commission's release of the reports under the FOIA.



tively must show a 'particularized need' in order to withhold the report from the subject." *Durns*, 804 F.2d at 708 (dissenting opinion). It is evident, therefore, that presentence reports would be "routinely available" to prisoners in discovery proceedings with the Parole Commission, and nothing in this Court's rulings in *Weber Aircraft* or *Grolier* suggests that such materials may be withheld under Exemption 5.

Petitioners—and the majority in Durns—sidestep this seemingly inevitable conclusion by citing cases in which *third parties* have been unable to obtain presentence reports from sentencing courts, and on that basis they assert that the reports are "generally" not available in discovery proceedings. Pet. Br. at 22-23; *Durns*, *supra*, 804 F.2d at 704. The fallacy in this approach is that it fails to recognize that the very existence of many discovery privileges is a function not only of the type of document that is at issue, but also of the class of requester seeking the document. Thus, in *Grolier* and *Weber Aircraft*, the documents at issue were "normally privileged from discovery by *anyone*" under well-established discovery rules; no one could obtain the documents without a special showing of need. *Durns*, 804 F.2d at 708 (dissenting opinion) (emphasis in original).

In stark contrast, there simply is no "overall privilege" for presentence reports in discovery proceedings; any privilege which may exist is limited to third parties—because of the concern for prisoners' privacy—and has no logical or legal relevance to prisoners' requests for their own presentence reports which they have already been permitted to review. As explained in one of the criminal cases relied on by petitioners, the general discovery rule "provides for the disclosure of such reports to a defendant who is the subject of the report" but provides that "infor-

mation contained in a presentence report should not be disclosed to third parties unless lifting confidentiality is required to meet the ends of justice." *United States* v. *Figurski*, 545 F.2d 389, 391 (4th Cir. 1976). Such decisions, as noted in Judge Beezer's opinion below, simply "do not create a privilege which justifies withholding presentence reports" from the subjects of the reports. Pet. App. 12a.

In essence, under the government's new approach to Exemption 5, if *some* individuals must show a "particularized need" in order to overcome a discovery privilege that generally precludes *their* access to documents (as third parties must in order to obtain access to other persons' presentence reports), then the documents cannot be regarded as routinely available to *anyone*, even the subjects of the documents who ordinarily have a right of access to them. Under the government's analysis, for example, agencies could assert Exemption 5 to withhold attorney-client materials from the *clients themselves* because such materials are not "generally available" to other persons in discovery proceedings. It could hardly be clearer that the government's approach constitutes a "parody of legal formalism," *Durns*, *supra*, 806 F.2d at 1124 (statement dissenting from denial of rehearing *en banc*), "significantly exaggerates the scope of [this Court's] 'routinely available' standard," and erects an entirely new Exemption 5 test that covers "all documents arguably protected by privilege from someone, somewhere." *Durns*, 804 F.2d 708, 709 (Wright, dissenting).

The government's only justification for its admittedly wooden approach to Exemption 5 is that the FOIA "makes documents available—or unavailable—to the public at large," and thus courts cannot take into account differences between classes of requesters. Pet. Br. at 27.



But this notion—that a document which is properly released to one party can never be withheld from anyone (and vice versa)—itself "fundamentally misconceives the operation of [the Act's exemptions] and of the FOIA generally." Pet. Br. at 27. Even a cursory review of the statute reveals that an agency's ability to invoke the Act's exemptions often turns on whether the requester is a third party or the subject of the records in issue. For example, Exemption 6 protects information whose disclosure would entail "a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). While the release of personal records to third parties may entail an "invasion" of privacy, there would certainly be no such invasion if the release is made to the subjects of the records themselves. Hence, Exemption 6 could be used to withhold personal information from third parties, but not from first parties.[6]

Similarly, Exemption 4 protects documents containing "trade secrets" and "confidential commercial information." 5 U.S.C. § 552(b)(4). It would be ludicrous to suggest, and the government has never done so, that an

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[6] Even the author of *Durns* conceded this point in his statement on denial of rehearing *en banc*, *see* 806 F.2d at 1125, as did the government in another FOIA case in the D.C. Circuit. *See Greentree* v. *U.S. Customs Service*, 674 F.2d 74, 80 (D.C. Cir. 1982), *quoting* Government's Brief at 36 n. 18 ("[i]n the vast majority of cases, a *third party* would be prevented from obtaining access to records about another individual . . . because of the FOIA privacy exemptions . . . .") (emphasis added). Moreover, as recounted earlier, Congress expressly reaffirmed that it intended the FOIA to be used by individuals to obtain records about themselves when it amended the Privacy Act in 1984. *See supra* at 13. Congress obviously did not intend that when individuals avail themselves of this right, highly personal records could thereafter be obtained by any member of the public under the FOIA.

agency which releases documents containing trade secrets or confidential commercial information to a corporation which provided the agency with most of that information in the first place, is thereby precluded from claiming Exemption 4 when the corporation's competitors request the same documents. It is far more consonant with the structure and purpose of the FOIA to conclude that discovery privileges that are based on considerations of personal privacy and that can be invoked against third parties to block *their* access to documents under Exemption 5, should have no bearing whatsoever on whether the subjects of the records may have access.

As the foregoing suggests, there is undoubtedly an important policy to be served in generally keeping presentence reports out of the hands of third parties. But that interest has nothing to do with protecting confidential sources, since the Commission is already authorized by the Parole Act, and hence Exemption 3, to withhold such information from everyone, including the subjects of the reports. And, as the Commission itself has admitted, because prisoners are already permitted to see and take verbatim notes on the contents of their presentence reports (with the exception of sources and other confidential information), there is no "real reason against letting the defendant obtain a copy." Add. 5a; *see also Berry* v. *Dep't of Justice*, *supra*, 733 F.2d at 1355 ("common sense suggests" that giving prisoners copies of reports that they are otherwise entitled to read "will not chill information sources"). Rather, the rationale for not allowing presentence reports to be freely disseminated to the public is to protect the prisoners' own privacy by preventing third parties from scrutinizing highly personal and potentially embarrassing details about the prisoners' lives. *See* McLauchlan, *supra* at 348-53; Fennell & Hall, *supra* at 1683-84.



That compelling privacy interest, however, affords no basis for incorporating a "presentence report privilege" into Exemption 5, particularly in light of this Court's admonition that it will "hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another [FOIA] exemption." *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340, 355 (1978). Congress decided to deal with many "civil discovery privileges in exemptions other than Exemption 5," *Id.*, and it was for the precise purpose of resolving personal privacy concerns that Congress created Exemption 6's balancing test. Under that test, as noted earlier, prisoners would not be precluded from securing copies of their own presentence reports, but third parties would almost invariably be prevented from obtaining them. *See Barry* v. *Dep't of Justice*, *supra*, 733 F.2d at 1353.[7]

At core, the government is asking this Court not only to expand Exemption 5 to cover "every privilege known to civil [and criminal] discovery," regardless of whether they overlap with other FOIA exemptions, *Federal Open Mar-*

[7] The majority in *Durns* acknowledged this Court's statements that Exemption 5 should not be read to duplicate other exemptions, but it described them as "dictum" and gave them little weight. 804 F.2d at 706 n.8. In addition, in a statement on denial of rehearing *en banc*, the author of the majority opinion in *Durns* seemed to concede that Exemption 6 would generally apply to third party requests for presentence reports, yet he concluded that it was undesirable to use that exemption rather than Exemption 5 because such reliance "could generate a spate of new fact-specific cases where the invasion of privacy is only arguably 'clearly unwarranted.'" 806 F.2d at 1125. That position erroneously suggests that the courts are free to ignore the "fact-specific" balancing test which Congress crafted for precisely this kind of case, and instead to read into Exemption 5 a new presentence report privilege, simply because it may be easier to apply such a test on a wholesale basis.

*ket Committee* v. *Merrill*, *supra*, 443 U.S. at 354, but to enlarge those privileges to block FOIA access by the very persons that the privileges were designed to protect in the first place. This vastly expanded construction of Exemption 5 would not only eclipse Exemption 6, which Congress wanted agencies to use in resolving privacy concerns, but it would totally undercut Congress' determination, reaffirmed just three years ago, that individuals should be permitted to use the FOIA "to seek access to records about themselves." H.R. Rep. No. 726, Part II, 98th Cong., 2d Sess. 15 (1984); *see supra* at 11.

There are a host of privileges which have been created, in large measure, because of the "protection that [they] . . . afford to individual privacy," including the attorney-client privilege, the medical and counseling privileges, the clergy-communicant privilege, and the various familial privileges. Developments in the Law, *Privileged Communications*, 86 Harv. L. Rev. 1450, 1480, 1501-63 (1985) (hereafter "Privileged Communications"). Applying the government's analysis, all of these privileges could be used to deny FOIA access to the very persons whose interests the privileges are designed to protect. For example, most jurisdictions safeguard confidential communications between doctors and patients because it is necessary to "protect that information from *public disclosure*." *Id.* at 1531 (emphasis added). But under the government's reading of Exemption 5, patients of the Veterans Administration, for instance, could be denied access to their *own* medical records because such records are not "generally" available to others in discovery proceedings. Congress could not and did not intend Exemption 5 to produce this kind of anomalous result, but it is compelled by the government's interpretation of the exemption.



**3. The Commission Has Waived Any Privilege By Revealing To Respondents The Contents Of Their Presentence Reports.**

Finally, even if presentence reports were normally privileged from discovery by prisoners, the government's Exemption 5 claim is contrary to another fundamental tenet of FOIA law—that if the government does not keep information confidential, it waives any discovery privilege that might otherwise have been raised. *See Coastal States Gas Corp.* v. *Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980); *Mead Data Central, Inc.* v. *Dep't of Justice*, 566 F.2d 242, 258 (D.C. Cir. 1977); *Center for Auto Safety* v. *Dep't of Justice*, 576 F. Supp. 739, 749 (D.D.C. 1983); *see also State of North Dakota ex rel. Olson* v. *Andrus*, 581 F.2d 177, 181 (8th Cir. 1981); *cf. Murphy* v. *Dep't of the Army*, 613 F.2d 1151, 1155 (D.C. Cir. 1979) (disclosure of documents to Congress does not compromise the confidentiality of documents and thus does not constitute a waiver of the deliberative privilege).

Moreover, the waiver at issue here stems not from a voluntary decision to disclose an otherwise confidential document, but from two statutes that *require* the disclosure of presentence reports to their subjects. As the court below recognized, Rule 32 and section 4208 of the Parole Act "constitute a Congressional mandate which waives the government's privilege to withhold presentence reports from the subjects of the reports." Pet. App. 12a n.7. In this very case, the government complied with Congress' directive and disclosed to respondents the contents of their presentence reports. Accordingly, the government can no longer argue that these reports are privileged under Exemption 5.

The government's response to this argument is that the Parole Act does not "constitute a 'waiver' of the Commis-

sion's right to withhold a *copy* of the report from release to the subject of the report." Pet Br. at 39 n.22 (emphasis added). However, the government has cited no case in support of the notion that there is a legally material distinction between disclosing the contents of a document and actually providing a copy, and there is no basis for it in either the Parole Act, the FOIA, or the law of privileges. Thus, contrary to the government's persistent but erroneous suggestions, the Parole Act makes no distinction whatsoever between giving prisoners copies of presentence reports and allowing them other kinds of "reasonable access" to the documents. 18 U.S.C. § 4208(b). Indeed, the Commission admitted to this Court in *Crooker* that the statute contains no "requirement that the prisoner return copies of any documents (including the presentence report) to the Commission . . . ." *Crooker* Opp. at 16 n.7. Likewise, as the court below reasoned, the "'FOIA speaks in terms of disclosure and nondisclosure. It does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents.'" Pet. App. 12a n.7, *quoting Berry, supra*, 733 F.2d at 1355. Accordingly, there is nothing in either the Parole Act or the FOIA which confers on the Commission a right to withhold a copy of a presentence report which has already been shown to the requester.

It is also a well-established principle of waiver law that "*any disclosure* of a confidential communication . . . will waive the privilege." Privileged Communications, *supra* at 1630 (emphasis added). Thus, disclosure of the contents of a document ordinarily vitiates any privilege that might otherwise be asserted. *See, e.g., Smith* v. *Alyeska Pipeline Service Co.*, 538 F. Supp. 977, 979 (D. Del. 1982), *aff'd*, 758 F.2d 668 (3d Cir. 1985); *Int'l Paper Co.* v. *Fibreboard Corp.*, 63 F.R.D. 88, 92 (D. Del. 1974); *Lee*



*National Corp.* v. *Deramus*, 313 F. Supp. 224, 227 (D. Del. 1970); *see also In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982). Accordingly, whether the government's argument is viewed from the vantage point of the relevant statutory schemes, or from the perspective of the common law of privileges, petitioners clearly cannot claim Exemption 5 for reports whose contents have already been revealed to their subjects.[8]

Congress was "aware that an overbroad interpretation of exemption five could nearly nullify the disclosure mandate of the FOIA and indicated that it should be applied as 'narrowly as consistent with efficient Government operation.'" *Mead Data Central, Inc.* v. *Dep't of the Air Force*, *supra*, 566 F.2d at 252 n.16, *quoting* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Rather than heed that directive, the government has invited the Court to open a

---

[8] The *Durns* majority, in a footnote, rejected this waiver argument on the grounds that, even if it "would be accepted in the civil discovery context, it does not establish that presentence reports are routinely available and so does not satisfy Exemption 5's test." 804 F.2d at 706 n.8. However, that approach overlooks the fact that the very existence of a discovery privilege requires proof that information has been kept confidential, and therefore incorrectly reads the entire law of waiver out of Exemption 5. *See Martin* v. *Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1185 (D.C. Cir. 1987) ("the words of [Exemption 5] point clearly, unequivocally, to the incorporation of all civil discovery rules into" the exemption). Under the *Durns* analysis, for example, an agency could freely disseminate a document to persons both inside and outside of the agency and then assert Exemption 5 as a basis for withholding it from a particular FOIA requester because it would "normally" be covered by the attorney-client privilege. Because that approach makes no sense and invites agencies to use Exemption 5 in a discriminatory manner, it should be rejected by this Court.

Pandora's box of new Exemption 5 privileges that could be used to withhold vast categories of documents from the very persons the privileges were designed to protect, and that could also displace the role reserved by Congress for the FOIA's other exemptions, particularly Exemption 6. The Court should decline that invitation, as did the court below, and reject petitioners' Exemption 5 claim.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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*October 1987*

# ADDENDUM

# ADDENDUM A

## RELEVANT STATUTORY PROVISIONS

The Freedom of Information Act, 5 U.S.C. § 552, provides in relevant part:

(b) This section does not apply to matters that are—

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy:

* * * * *

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. . . .

## ADDENDUM B

Subject
Presentence Report Disclosure (with specific reference to the request of

To
William H. Webb, Chief U.S. Probation Officer
U.S. District Court

From
Benjamin F Baer, Chairman
U.S. Parole Commission

Date
September 9, 1982

We have recently received a request under the Freedom of Information Act from a prisoner convicted in the U.S. District Court for the District of Columbia for a copy of the presentence investigation report prepared by your office. The prisoner has not, to our knowledge, approached the Court for a copy. The purpose of this memorandum is to request that the Commission be informed of the official position of the Court with respect to the status of this and other reports prepared by your office; that is, whether the Court wishes to retain control over the reproduction of its reports or whether the Commission is to consider the report an agency document like any other, which it is free to reproduce in response to requests under the Freedom of Information Act.

Although the Parole Commission believes that it would be good correctional policy to have copies of these reports given to defendants at sentencing or as soon therafter as feasible, we recognize that the report is originated by the Court, which has the initial prerogative under Rule 32(c)(3)(D), F.R. Crim. P., to decide the question of who retains copies and when. Our rule at 28 C.F.R. § 2.56(b), accordingly, directs all requests for these reports to the sentencing court.

Our present need for instruction from the Court stems from the fact that in *Carson* v. *U.S. Department of Justice*, 631 F.2d



1008 (D.C.. Cir. 1980), a presentence report from the District of Massachusetts was held to be an "agency record" subject to the Freedom of Information Act (FOIA) *in the absence of any express retention of control by the sentencing court*. After the U.S. District Court for the District of Massachusetts issued an "order retaining custody and control" of all presentence reports prepared in that district, Judge Gasch on remand held that he was without jurisdiction to order the release of the report under the FOIA.

## ADDENDUM C

U.S. Department of Justice
United States Parole Commission

Office of the Chairman
5550 Friendship Blvd.
Chevy Chase, Maryland 20815

February 15, 1984

Honorable John A. MacKenzie
Chief Judge
United States District Court
Eastern District of Virginia
Room 319, U.S. Courthouse
Norfolk, Virginia 23510

Re: Presentence Reports from E.D. Virginia in the U.S. Parole Commission's files

Dear Chief Judge MacKenzie:

Enclosed is an opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Lykins* v. *Department of Justice, et al.*, No. 83-1031 (Jaunary 27, 1983), which requires us to treat a presentence report in your district as an "agency record" subject to the Freedom of Information Act (FOIA). You will note that the Court of Appeals, with respect to the order entered by your Court on December 9, 1983, held that Congres has divested the district courts of the authority both to withhold presentence reports from the Parole Commission and to retain control over the disposition of the reports once they are transmitted. We had argued that the Commission was bound to comply with your order, but the Court did not agree, for the reasons stated in Footnote 7 of the opinion.

At this time, we see no point in asserting any exemptions under the FOIA on remand because the report has already been shown to the defendant; we think it inevitable that the Court of Appeals would reject any arguments for non-disclosure under the FOIA which we could conceivably make. We



also do not believe that the case is in a suitable posture for us to seek *certiorari* (although we will ask for rehearing).

Our preference is that your District Court withdraw its order of December 9, 1983, and authorize disclosure of its reports under the FOIA. I note that the U.S. District Court for the District of Columbia, under Chief Judge Aubrey E. Robinson, Jr., now routinely permits defendants to keep copies of the disclosable parts of their presentence reports, with no reported adverse consequences. Frankly, I believe that it is no longer possible for us to hope that the modern trend toward disclosure of Government documents will not ultimately carry presentence reports along with it. Even Rule 32, F.R. Crim. P., itself has recently been amended to require the report to be shown to the defendant as well as to the attorney. That change would seem to remove any real reason against letting the defendant obtain a copy. In cases where there is confidential information which is not to be shown to the defendant [under one or more of the three exemptions provided in Rule 32(c)], I can assure you that such material will be protected from disclosure under the FOIA as well. See 28 C.F.R. § 2.56(c). Thus, the *Lykins* opinion affects only reports which are already disclosable to the defendant under Rule 32. (Third party access under the FOIA would also not be available.)

I think that the real reason that probation officers have traditionally been reluctant to let defendants keep copies of these reports is the concern that the defendant will litigate over anything in his report that is controversial. Thus, anything written for disclosure will tend to be bland and uninformative. However, in my opinion, there is no reason for a properly researched report that states the facts as they are to cause a probation officer any embarassment. The Parole Commission staff have for years written everything with disclosure in mind, and our hearing summaries and case evaluations are just as frank and hard-hitting as they ever were. Careless and inflammatory language has disappeared, but that is a result of proper training and professionalism.

Moreover, it would appear that probation officers are immune from suits brought against them based on what they put in their reports, see *Spaulding* v. *Nielsen*, 599 F.2d 729 (5th Cir. 1979), and the courts themselves do not have to entertain endless suits to correct presentence reports. See, e.g., *United States* v. *Stevenson*, 573 F.2d 1105 (9th Cir. 1978).

Finally, I perceive no serious threat to the willingness of confidential sources to come forward, because the probation officer can still guarantee confidentiality under Rule 32(c) and the Freedom of Information Act. All he has to do is to place the sensitive material in the "confidential" section, as his manual instructs, and it will be protected.

I have been advised that one measure which has been under consideration by your probation staff is to recommend withholding presentence reports from the Commission in the future, as a way of avoiding the FOIA. I do not believe that would be a constructive solution. Congress intended that parole decisions be made with full knowledge of the defendant's presentence report. See 18 U.S.C. § 4206(a) and § 4207. I am not suggesting that I agree with the *Lykins* panel that 18 U.S.C. § 4205(e) *requires* a court to furnish the reports to the Commission, but I believe that the courts in their supervisory capacity will recognize that the probation office is expected by Congress to make the reports routinely available to the Commission. I trust you will agree with me that it would be most disruptive and unfair to the public to expect the Commission to make release decisions without them.

In conclusion, I intend for the moment to avoid premature disclosure of the Lykins' presentence report under the District of Columbia Circuit's order until we can reach some resolution of the problems posed by your order of December 19, 1983. The Court of Appeals here is clearly impatient with our position on the matter, however, and once the mandate issues I doubt that we could postpone disclosure much further. I would be glad to



discuss the matter with you personally, if you so wish; and I look forward to your response.

Sincerely,

/s/_____

BENJAMIM F. BAER
Chairman
U.S. Parole Commission

Enclosure

cc: Donald L. Chamlee
Director
Probation Division
Administrative Office of
the United States Courts

William M. Nichols
General Counsel
Administrative Office of
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Billy J. Torrans
Chief U.S. Probation Officer
Eastern District of Virginia

BFB/JAB/MAS:ert

# REPLY

# BRIEF

FOR ARGUMENT

(6)

Supreme Court, U.S.
FILED
JAN 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1357

# In the Supreme Court of the United States

OCTOBER TERM, 1987

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UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

KENNETH MICHAEL JULIAN AND
MARGARET J. WALLACE

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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CHARLES FRIED
*Solicitor General*
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# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1357

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

KENNETH MICHAEL JULIAN AND
MARGARET J. WALLACE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

Respondents concede (Resp. Br. 41) that presentence reports are highly confidential documents that "almost invariably" are exempt from mandatory release under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552. See also Resp. Br. 30 n.4, 38. Respondents contend, however, that the subject of a particular presentence report has a unique right to obtain a copy of that report from the Parole Commission or Bureau of Prisons under the FOIA. That contention is wrong for at least three reasons. First, it is flatly inconsistent with the determination by both this Court and Congress when Fed. R. Crim. P. 32(c)(3)(E) was enacted in 1975 that, although a defendant may be permitted to read his report prior to sentencing, he does *not* have a right to obtain a copy of the report unless the sentencing court affirmatively authorizes him to do so. Second, it is contrary to the Parole Commission's parallel and longstanding procedures, under which the prisoner may once again read his presentence report prior to his parole hearing, but may *not*

receive a copy of the report unless the sentencing court authorizes him to do so. Third, respondents' approach improperly relies on the public disclosure provisions of the FOIA as a basis for seeking a special right of access to documents that concededly are not available to other members of the public and are not available to respondents themselves under the Privacy Act of 1974, 5 U.S.C. (& Supp. IV) 552a.

Contrary to respondents' contention, the various restrictions on dissemination of presentence reports are not designed primarily to protect the personal privacy of the subject of the report. Rather, they are intended to protect the *governmental* interest in the free flow of information to the sentencing court and the Parole Commission, and thereby to promote the accuracy and integrity of the sentencing and parole processes. In particular, the limited right of discovery of a presentence report at the time of a sentencing or parole hearing represents a "sophisticated compromise"[1] between the goal of maximizing the confidentiality of presentence reports in order to preserve the ability of probation officers to obtain as much relevant information as possible from all sources, and the competing goal of assuring that the subject of the report is able to identify possible inaccuracies in the report on those particular occasions when it will be relied upon in adjudicatory proceedings affecting his liberty. The provisions of Rule 32(c)(3)(E) and Parole Commission procedures that permit the defendant or prisoner to read but not obtain a copy of his presentence report assure that the report will continue to be tightly held and that its contents will not be disclosed to *anyone*—the prosecutor, the subject of the report, or any member of the public—in the absence of a finding of special need.

Respondents' contention that the subject of a presentence report may freely obtain a copy of it under the

[1] Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1634 (1980).



FOIA—and then further disseminate the report to whomever he pleases—would undermine one of the central purposes of the restrictions on discovery of the report at the time of a sentencing or parole hearing: "to insure that [presentence reports] do not become available to unauthorized persons" (H.R. Doc. 93-292, 93d Cong., 2d Sess. 71 (1974)). Moreover, acceptance of that contention by this Court would permit precisely the sort of circumvention of discovery restrictions that the Court has refused to countenance in other FOIA cases. If the policy of strict confidentiality that now governs presentence reports in the possession of most sentencing courts, the Parole Commission, and the Bureau of Prisons is to be abandoned, as respondents urge, that result should be accomplished only through a formal amendment to Rule 32 and the parole and prison statutes—a process that would afford Congress and this Court an opportunity to weigh the competing policy considerations after receiving the views of interested agencies, federal judges, probation officers, the Judicial Conference, the subjects of the reports, and others. In the absence of a formal amendment, copies of presentence reports in the possession of the Parole Commission and Bureau of Prisons continue to be protected from mandatory disclosure by Exemptions 5 and 3 of the FOIA.

### A. EXEMPTION 5

We demonstrated in our opening brief (Gov't Br. 20-42) that presentence reports are protected by FOIA Exemption 5, which provides that the Act's disclosure mandate shall not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Presentence reports would not be routinely available in discovery in civil litigation with the Parole Commission or Bureau of Prisons, because "[a]n impressive body of doctrine recognizes the privileged nature of presentence reports." *Durns* v. *Bureau of Prisons*, 804 F.2d 701, 704 (D.C.

Cir. 1986), petition for cert. pending, No. 86-6550. Respondents' efforts to avoid the FOIA consequences of this privilege are unavailing.

1. Respondents first contend (Resp. Br. 34-35) that presentence reports in the possession of the Parole Commission and Bureau of Prisons are not "inter-agency or intra-agency memorandums" within the meaning of Exemption 5 because they are prepared by probation officers. Respondents rely on the fact that probation officers are appointed by and serve under the direction of the courts (18 U.S.C. (Supp. IV) 3602(a) and 3603(h)) and that courts are excluded from the definition of the term "agency" for purposes of the FOIA (5 U.S.C. (& Supp. IV) 551(1)(B) and 552(f)). This contention is without merit.

a. The courts have uniformly recognized that information and documents furnished to a FOIA agency by persons outside the agency may nevertheless be "intra-agency" memorandums protected by Exemption 5. In the leading case, the District of Columbia Circuit held that information furnished by Senators to the Attorney General concerning judicial nominations were "intra-agency" memorandums protected by the deliberative process privilege under Exemption 5, even though the Senators who submitted the materials were not in an "agency" for purposes of the FOIA. *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-791 (1980). "Unquestionably," the court reasoned, "efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects" (*id.* at 790). Against this background, the court concluded that "Congress apparently did not intend 'inter-agency' and 'intra-agency' to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process" (*ibid.*).

Other appellate decisions have likewise sustained the application of Exemption 5 to reports prepared by outside consultants or advisors. See *Government Land Bank* v. *GSA*, 671 F.2d 663, 665 (1st Cir. 1982); *Hoover* v. *Department of the Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980); *Lead Industries Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Soucie* v. *David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). Similarly, statements furnished by an outside party to military aircraft safety investigators have been found to be covered by the *Machin* privilege[2] that was recognized under Exemption 5 in *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984). See *Brockway* v. *Department of the Air Force*, 518 F.2d 1184, 1186, 1191-1192 (8th Cir. 1975).[3] Indeed, the statements at issue in *Machin* itself were furnished by persons outside the government. See 316 F.2d at 339. When Congress expanded Exemption 5 beyond the narrow scope of the original Senate proposal in order to permit the withholding of privileged factual material, not merely matters of law and policy, it acted in direct response to concerns expressed by government witnesses at the hearings (*EPA* v. *Mink*, 410 U.S. 73, 90-91 (1973)), including recommendations that the *Machin* privilege be incorporated into the FOIA (*Weber Aircraft*, 465 U.S. at 803 n.22). Against this background, it is reasonable to infer that Congress specifically intended to accord privileged status to factual material that is furnished by persons outside the agency but is nevertheless important to the agency's deliberative processes. See H.R. Rep. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis added) ("a Government agency cannot always operate effectively if it is required to disclose

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[2] See *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).

[3] In *Weber Aircraft*, the requester argued that "intra-agency memorandums or letters" cannot include statements made by civilians to Air Force personnel. The Court did not resolve that question, however, because the material at issue included only statements made by Air Force personnel. 465 U.S. at 798 n.13.

documents or information which it has *received* or generated"); cf. *FOMC* v. *Merrill*, 443 U.S. 340, 357-359 (1979).

b. Beyond the foregoing general considerations, there is a compelling basis for finding that the specific documents at issue here are "inter-agency or intra-agency memorandums" within the meaning of Exemption 5. Presentence reports are not like letters or other materials that might be sent to an agency by private citizens on their own initiative and then be relied upon by the agency in its discretion. Rather, the probation officer's furnishing of presentence reports is required by 18 U.S.C. 4205(e), which provides that, "[u]pon the request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency * * *." By the quoted language, Congress has essentially assimilated probation officers to the status of other government agencies that furnish information to the Parole Commission and that concededly are covered by the FOIA. Accordingly, for present purposes, the presentence reports may properly be regarded as "inter-agency" memorandums under Exemption 5. That is especially so in light of the fact that the purpose of the exclusion of courts from coverage under the FOIA was to protect court records from mandatory release under that Act, not to require such release, as respondents' reliance on the non-"agency" status of courts would do.

The presentence reports at issue here are also properly regarded as "intra-agency" memorandums for purposes of Exemption 5, because of the formal relationship that the probation officer bears to the deliberative processes of the Parole Commission and Bureau of Prisons. Fed. R. Crim. P. 32(c)(3)(D) and (F) recognize that probation officers prepare presentence reports for the benefit of the Parole Commission and the Bureau of Prisons as well as the sentencing court (see also 97 F.R.D. 245, 306, 308, 309 (1983)), and Congress has directed the



Commission to consider the reports in making parole decisions. See 18 U.S.C. 4207(3). Congress has therefore mandated that the prisoner's presentence report be made an integral part of the deliberative process that Exemption 5 was intended to protect. Even those courts that have denied "intra-agency" status to certain statements submitted by persons outside the agency have recognized that that status may be accorded to documents where, as here, they are furnished by outsiders "who have a formal relationship with the agency." *Van Bourg, Allen, Weinberg & Roger* v. *NLRB*, 751 F.2d 982, 985 (9th Cir. 1985); see also *County of Madison* v. *Department of Justice*, 641 F.2d 1036, 1040-1041 (1st Cir. 1981).[4]

Consistent with these principles and the "functional approach" adopted in *Ryan*, the District of Columbia Circuit held in *Durns* that copies of presentence reports furnished to the Parole Commission and Bureau of Prisons are "inter-agency or intra-agency memorandums" for purposes of Exemption 5. The court reasoned that "[i]f a report is not subject to disclosure in the hands of the courts, and is exempt from disclosure if distributed to the Parole Commission by another 'agency,' then it would make little sense indeed to hold that that report is subject to disclosure when distributed from the courts to the Commission" (804 F.2d at 704 n.5).[5] There is no reason for this Court to reach a different conclusion.

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[4] The law review note that respondents quote for the proposition that Exemption 5 applies only to documents that " 'an agency [itself] puts in writing' " (Resp. Br. 35, quoting Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1048-1049 (1973) (brackets added by respondents)) in fact endorses the view that Exemption 5 should be interpreted to include materials submitted by disinterested consultants and outside experts (86 Harv. L. Rev. at 1063-1064). See also Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 941-942 (1974).

[5] Although Judge Wright dissented from the majority's holding in *Durns* that presentence reports are privileged from disclosure to the subjects of the reports, he did not take issue with the

2. Respondents stop just short of conceding that presentence reports are generally privileged from discovery in civil litigation with the Parole Commission or Bureau of Prisons. They merely object in passing that we "rely exclusively on cases in which courts, in *criminal* cases in which neither agency was a party, have restricted access to presentence reports" (Resp. Br. 35 (emphasis added)).

The assertion that we rely exclusively on criminal cases is false. The seminal case in this area, *Hancock Bros.* v. *Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968), was a private *civil* antitrust action in which the plaintiffs served a subpoena duces tecum on federal officials seeking a presentence report prepared in related criminal proceedings. Similarly, in *United States* v. *Charmer Industries*, 711 F.2d 1164 (2d Cir. 1983), a state attorney general sought a presentence report for use in license revocation proceedings. In each case, the court held that the report could not be disclosed absent a showing that the ends of justice so required. 293 F. Supp. at 1233; 711 F.2d at 1173-1176. See also *United States* v. *Krause*, 78 F.R.D. 203 (E.D. Wis. 1978) (judgment creditor of

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majority's holding that a presentence report is an "inter-agency or intra-agency" memorandum. See 804 F.2d at 706-710. In her statement dissenting from the denial of rehearing en banc in *Durns* (806 F.2d 1122, 1123-1124 (1986)), Chief Judge Wald, joined by three other Judges, attempted to distinguish *Ryan* on the ground that the documents in *Ryan* were generated at the initiative of the Department of Justice, while in *Durns* the documents were created by the probation officers for use by the court at sentencing (*id.* at 1123). This attempted distinction ignores several critical points: (i) as Rule 32, 18 U.S.C. 4205(e) and 18 U.S.C. 4207(3) all recognize, the probation officer prepares the presentence report for use by the Parole Commission and Bureau of Prisons as well as the sentencing court; (ii) the probation officer does so not in response to a mere agency request, but pursuant to statutory command; and (iii) the same statute also requires the Parole Commission to consider the report in its deliberations. Contrary to Chief Judge Wald's view in *Durns*, it follows a fortiori from *Ryan* that presentence reports are "inter-agency or intra-agency" memorandums for purposes of Exemption 5.



defendant could not obtain a copy of presentence report). It is true that most of the other cases cited in our opening brief (Gov't Br. 21-22) involved instances in which a criminal defendant sought the presentence report of a co-defendant, government witness, or informant; but it follows a fortiori from those decisions finding presentence reports to be privileged even in criminal cases that they likewise are not routinely available in civil discovery. Moreover, in a number of the criminal cases, the court relied upon *Hancock Bros.*, a civil case. See *Durns*, 804 F.2d at 705; *United States* v. *McKnight*, 771 F.2d 388, 390 (8th Cir. 1985), cert. denied, 475 U.S. 1014 (1986); *United States* v. *Anderson*, 724 F.2d 596, 597 (7th Cir. 1984); *United States* v. *Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977); *United States* v. *Cyphers*, 553 F.2d 1064, 1069 (7th Cir.), cert. denied, 434 U.S. 843 (1977); *United States* v. *Figurski*, 545 F.2d 389, 391 (4th Cir. 1976).

Respondents' related argument (Resp. Br. 35) that the presentence-report privilege is inapplicable here because neither the Parole Commission nor the Bureau of Prisons was a party to the cases recognizing that privilege is equally without merit: the efficacy of a privilege that protects the interests of the government as a whole does not depend upon the identity of the governmental entity from which the requester seeks the document. Indeed, a failure to apply governmental privileges in a uniform manner would encourage forum-shopping and circumvention of established privileges. In this case, for example, the presentence-report privilege recognized by the courts is intended to preserve the ability of probation officers to assure confidentiality for sources of information, and that purpose would be seriously undermined whether members of the public obtained copies of the report from the court, the Parole Commission, or the Bureau of Prisons. For this reason, when Congress directed the probation officers to furnish presentence reports to the Parole Commission (see 18 U.S.C. 4205(e)), it surely intended that the report would continue to be

privileged after the transmittal. *Durns*, 804 F.2d at 705.[6] Although "Congress, of course, has the power to modify the rule of secrecy • • • [,] the rule is so important, and so deeply rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so." *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 572-573 (1983).

3. Respondents next contend (Resp. Br. 36-42) that our reliance on Exemption 5 is misplaced because any presentence-report privilege only protects against dissemination to third-party requesters, not to the subject of the report. But respondents have no special right of access to presentence reports under the FOIA in general or Exemption 5 in particular.

a. The FOIA "is fundamentally designed to inform the *public* about agency action and not to benefit private litigants." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (emphasis added). Consistent with this purpose, the FOIA requires an agency to disclose nonexempt documents to "any person" (5 U.S.C. 552 (a)(3)), not merely to those, such as respondents, who might claim a special interest in them. In addition, respondents' contention that they have a unique right of access because the particular documents at issue directly

[6] As we explain in our opening brief (Gov't Br. 23, 37-38 n.21), this conclusion also is supported by Congress's understanding when it enacted the Parole Act in 1976 that parole would be an extension of the sentencing process, that the Parole Commission would stand in the shoes of the court, that the Commission's use of presentence reports would closely parallel that of the courts, and that the courts were then thought to have control over such reports even when they were used in the parole-determination process. See S. Rep. 94-369, 94th Cong., 1st Sess. 15-16 (1975); H.R. Conf. Rep. 94-838, 94th Cong., 2d Sess. 19 (1976); 121 Cong. Rec. 15705 (1975) (remarks of Rep. Drinan); *Parole Reorganization Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 131, 152, 169, 190-191, 201, 204 (1973); *United States* v. *Addonizio*, 442 U.S. 178, 188-190 (1979).



concern them cannot be squared with the legislative history of the FOIA. That history, which we describe in our opening brief (Gov't Br. 28-29), demonstrates that the rule of mandatory disclosure to "any person" (or to no one) was a deliberate repudiation of the former Section 3(c) of the Administrative Procedure Act (5 U.S.C. (1964 ed.) 1002(c)), which conferred a special right of access on "persons properly and directly concerned" with the requested material. *EPA* v. *Mink*, 410 U.S. at 79. This overriding legislative purpose of the FOIA, which respondents make no effort to refute, establishes a heavy presumption against respondents' claim of a special prerogative to pierce *any* of the FOIA Exemptions that entitle an agency to withhold materials from the general public. *Sears, Roebuck*, 421 U.S. at 149 & n.16.[7]

b. Respondents' burden is especially heavy in seeking to establish a special right of access to documents that are protected by a privilege incorporated into Exemption 5. The very nature of a privilege is to afford presumptive protection against disclosure to anyone. Moreover, the use of the indefinite article "a" in the text of Exemption 5—which protects documents that "would not be

[7] Respondents rely (Resp. Br. 11, 39 n.6, 42) on the 1984 amendment to the Privacy Act that bars an agency from relying on any Privacy Act exemption to withhold any record that is otherwise accessible to the requester under the FOIA. 5 U.S.C. (Supp. IV) 552a(q)(2), as added by Pub. L. No. 98-477, § 2(c), 98 Stat. 2212. See *Department of Justice* v. *Provenzano*, 469 U.S. 14 (1984). They also quote the House Report on this amendment for the proposition that "individuals should be permitted to use the FOIA 'to seek access to records about themselves.'" Resp. Br. 11, 42 (quoting H.R. Rep. 98-726, 98th Cong., 2d Sess. Pt. 2, at 15 (1984)). But nothing in the amendment or the House Report suggests that the amendment was intended to confer a *special* right of access to records pertaining to the requester; the amendment merely removed a possible obstacle in Exemption (j)(2) of the Privacy Act to whatever right an individual might otherwise have under the FOIA to obtain records that happen to pertain to himself. See H.R. Rep. 98-726, *supra*, Pt. 2, at 15 (emphasis added) (the FOIA exemptions "define the categories of information that are exempt from *public* availability").

available by law to *a* party • • • in litigation with the agency" (emphasis added)—clearly "indicates that the scope of Exemption 5 is to be determined without regard to the particular circumstances or needs of any specific actual or hypothetical party." *Brockway* v. *Department of the Air Force*, 518 F.2d at 1192 n.7. The House Report reinforces this interpretation, stating that "any internal memorandums which would *routinely* be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. 1497, 89th Cong. 2d Sess. 10 (1966) (emphasis added). And this Court has consistently expressed the same view—namely, that "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance," without regard to the status of a particular requester. *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 26, 28 (1983) (quoting *Sears, Roebuck*, 421 U.S. at 148-149 & n.16); *Weber Aircraft*, 465 U.S. at 799-800, 801-802 & n.20). Accordingly, as the District of Columbia Circuit observed in *Durns*, "[t]hat a particular individual with a special interest in or need for certain documents could obtain discovery of them does not mean that they are *normally* available to private parties on a showing of relevance" (804 F.2d at 706 (emphasis added)).[8]

[8] Judge Wald, dissenting from denial of rehearing en banc in *Durns* on the ground that presentence reports are not "inter-agency or intra-agency memorandums," explicitly agreed (806 F.2d at 1123) with our view that "Exemption 5 permits no such distinction" between the subject of the report and the general public. She also said (*ibid.*) that the identity of the requester may be relevant under Exemption 6, which protects information whose disclosure would entail "a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6)). Respondents echo this contention (Resp. Br. 39), but there is no occasion in this case to consider the application of Exemption 6 to first-party requests, since the Parole Commission and Bureau of Prisons do not rely on that Exemption here. Exemption 5, discussed in the text, is primarily intended to protect the *governmental* interests underlying recognized privileges; unlike Exemption 6, it does not embody a balancing test that turns in part on an assessment of whether there will be an "invasion" of *personal* privacy if the agency makes a particular disclosure (*e.g.*, to the individual to whom the information pertains). For these reasons, even if respondents' view of Exemption 6 is correct, it has no bearing on this case.



c. Quite aside from the foregoing considerations bearing on the interpretation of Exemption 5 as a general matter, the particular Exemption 5 privilege at issue here provides no basis for recognizing a special right of access. Respondents maintain (Resp. Br. 34, 37, 40-41) that the only purpose of the presentence-report privilege is to protect the personal privacy of the subject of the report and that this purpose does not justify withholding a copy from the subject under Exemption 5. This argument fails because its premise is erroneous.

The presentence-report privilege is not primarily intended to protect the personal privacy of the subject of the report; it is intended to protect the distinct governmental interest in confidentiality, which serves to maximize the probation officer's access to information. Thus, as the District of Columbia Circuit recognized in *Durns*, the privilege reflects " 'the prevailing judicial view that the public availability of presentence reports would likely inhibit the flow of information to the sentencing judge' " (804 F.2d at 705 (quoting *United States* v. *Charmer Industries*, 711 F.2d at 1173)). Other courts have expressed the same view. See *United States* v. *McKnight*, 771 F.2d at 390; *United States* v. *Martinello*, 556 F.2d at 1216; *United States* v. *Dingle*, 546 F.2d 1378, 1381 (10th Cir. 1976); *United States* v. *Greathouse*, 484 F.2d 805, 807 (7th Cir. 1973); *United States* v. *Evans*, 454 F.2d 813, 820 (8th Cir. 1972). Compare *Weber Aircraft*, 465 U.S. at 797 & n.11, 803 n.23. This broad purpose of the privilege justifies withholding presentence reports from *all* requesters, including the subjects of the reports.

If there could be any doubt on this point, it is dispelled by the text and background of Fed. R. Crim. P. 32 (c)(3)(E). As we explained in our opening brief (Gov't Br. 29-35), there was extensive consideration for 30 years prior to 1975 of the circumstances under which

a defendant should be permitted to review the contents of his presentence report. Proposals to grant the defendant that right generated so much opposition among probation officers and district judges that, prior to the 1975 amendments to Rule 32, neither the defendant nor his counsel had a right even to *read* the report prior to sentencing. See Gov't Br. 30-33. In 1974, the Court submitted to Congress proposed amendments requiring the report to be made available to either the defendant or his lawyer prior to sentencing, but specifically providing that all copies of the report furnished to the defendant, his counsel, and the attorney for the government must be returned to the court immediately after the imposition of sentence. H.R. Doc. 93-292, 93d Cong., 2d Sess. 20-21 (1974). The advisory committee note states that this restriction was intended "to insure that [presentence reports] do not become available to unauthorized persons" (*id.* at 71). As thereafter enacted into law by Congress on July 31, 1975, Rule 32(c)(3)(D)—now Rule 32(c)(3)(E)—provides that copies of the presentence report made available to the defendant, his counsel, and the attorney for the government "shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs." Pub. L. No. 94-64, § 3(34), 89 Stat. 376. The House Judiciary Committee proposed this amendment because it believed that "there may be situations" in which the court might deem it "appropriate" for "either or both of the parties" to retain a copy of the report. H.R. Rep. 94-247, 94th Cong., 1st Sess. 18 (1975). But Congress, like this Court, specifically denied the defendant any *right* to receive a copy.

Rule 32 represents a "sophisticated compromise" between providing "an assurance of confidentiality that is as absolute as possible" (*CIA* v. *Sims*, 471 U.S. 159, 175 (1985) for sources of information, the people mentioned in the report, and the defendant himself, and at the same time providing the defendant with limited access—through the opportunity to read the report—at the time of sentencing. See Fennell & Hall, *supra*, 93 Harv. L.



Rev. at 1634. The Administrative Office of the United States Courts characterized Rule 32 in this manner in its comments opposing the rulemaking petition in which the Public Citizen Litigation Group urged the Parole Commission to provide for routine release of presentence reports to prisoners. The Administrative Office informed the Commission that "[p]robation officers do now and always have assured sources of information that the information they give will be made available to the courts, but only shown to the Government, the defendant and his counsel for reading. Otherwise, they are told, the information will be disclosed only with the court's permission." Pet. App. 25a.[9] But if the defendant were permitted to obtain a copy of the report, the Administrative Office continued, "[f]ar more mischief is possible" because the defendant would have all the information in the report "at his fingertips" and "there would be no way to effectively prohibit further disclosure of the information to third parties" (*ibid.*). The Administrative Office explained that Rule 32 therefore "strikes a balance" between the "due process" interests of the defendant at sentencing and the "concern of the courts that the defendant's retention of the presentence report is normally inimical to the interests of obtaining full and accurate information prior to sentencing" (Pet. App. 26a). The Administrative Office concluded that many sources of information (including state and local agencies) would be concerned if this careful balance were "nullif[ied]" through routine release of presentence reports to prisoners by the Parole Commission, since potential sources of information understandably "might have more confidence

[9] The Administrative Office explained that the imperative of assuring this level of confidentiality, while substantial, ordinarily does not require the court to prohibit the defendant from even reading the material at the time of sentencing, pursuant to Rule 32(c)(3)(A) (Pet. App. 25a). Respondents therefore err in contending that, because of the availability of Rule 32(c)(3)(A) and the parallel provision in 18 U.S.C. 4208(c)(2), the broad prohibition against dissemination of presentence reports to the subjects of those reports as well as third parties "has nothing to do with" confidentiality (Resp. Br. 40).

in the measured discretion of the court than the whims of the defendant" (*id.* at 26a-27a).

d. Thus, when Rule 32(c)(3)(E) was enacted in 1975, Congress and this Court obviously intended that presentence reports would not be made available to members of the public except upon a showing of special need (compare *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 221-224 (1979)), and it believed that the same rule should apply to the subject of the report. Both this Court and Congress simply made a legislative-type determination in 1975 that a defendant would be deemed to have demonstrated such a particularized need for the report when the court proposed to rely upon it at the sentencing stage of the criminal prosecution. Congress made a similar determination when it enacted the Parole Commission and Reorganization Act of 1976 (18 U.S.C. (& Supp. IV) 4201 *et seq.*), and it therefore provided that the Parole Commission must grant the prisoner "reasonable access" to all materials (including the presentence report) that are to be relied upon by the Commission in setting a parole date. 18 U.S.C. 4208(b). These determinations that the ends of justice require that the defendant or prisoner be permitted to read the report in connection with particular adjudicatory proceedings affecting his liberty scarcely establish that an actual copy of the report would be "routinely" or "normally" available to him on any other occasion. As a result, although the defendant or prisoner is given an opportunity to read the presentence report prior to his sentencing or parole hearing, the report at all times remains protected by the presentence-report privilege against further disclosure or release to *any* member of the public, including the subject of the report.[10]

[10] For this reason, respondents err in contending (Resp. Br. 43-46) that tne provisions permitting an individual to read his presentence report prior to his sentencing or parole hearing constitute a waiver of the Parole Commission's right to withhold a copy of the report from the prisoner under the FOIA. See *Durns*, 804 F.2d at 706 n.8; *Crooker* v. *BATF*, 789 F.2d 64, 65 n.1 (D.C. Cir. 1986). This waiver notion is completely answered by the requirement that the defendant or prisoner return the copy of the report he is permitted to read in preparation for the sentencing or parole hearing.

In analogous circumstances, where a document has been released in limited and controlled circumstances under a protective order, the right to withhold the document under Exemption 5 is not waived. See *Lead Industries Ass'n* v. *OSHA*, 610 F.2d at 79 n.13; J. O'Reilly, *Federal Information Disclosure*, para. 15.17, at 15-82 to 15-83 (1979). See also *FTC* v. *Grolier, Inc.*, 462 U.S. at 27-28.



**B. EXEMPTION 3**

Presentence reports also are protected against mandatory release to a prisoner by Exemption 3(B), which provides that the FOIA shall not apply to matters that are "specifically exempted from disclosure by statute * * *, provided that such statute * * * (B) * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). As we demonstrated in our opening brief (Gov't Br. 43-47), Fed. R. Crim. P. 32(c)(3)(E) is a withholding statute under this exemption. Respondents do not dispute that Rule 32(c)(3)(E) is a "statute" for purposes of Exemption 3 because it was enacted into law by Congress in 1975, or that Rule 32(c)(3)(E) refers to "particular types of matters"—indeed, to only one "matter," the presentence report.[11] But respondents do contend (Resp. Br. 25-28) that Rule 32(c)(3)(E) does not adequately specify that presentence reports are "to be withheld" by the Parole Commission.

a. Respondents first argue that Rule 32(c)(3)(E) does not refer to copies of presentence reports as matters to be "withheld" even by a court. This argument is completely without merit. The Rule expressly provides that "[a]ny copies of the presentence investigation report

[11] Accordingly, contrary to respondents' contention (Resp. Br. 24, 31-32), Rule 32(c)(3)(E) in no way resembles the statutes to which Congress intended to deny Exemption 3 status when it amended that Exemption in 1976. See Pub. L. No. 94-409, § 5(b), 90 Stat. 1247. Congress intended to exclude only those statutes, such as the one at issue in *FAA* v. *Robertson*, 422 U.S. 255 (1975), that granted the agency head "*cart blanche* [*sic*] to withhold any information he pleases." H.R. Rep. 94-880, 94th Cong., 2d Sess. Pt. 1, at 23 (1976)).

made available to the defendant and his counsel • • • *shall be returned to the probation officer* immediately following the imposition of sentence or the granting of probation, unless the court in its discretion otherwise directs" (emphasis added). The emphasized language, like its legislative history (see pages 13-14, *supra*), unambiguously contemplates that a copy of the presentence report may be "withheld" from the defendant, and in fact the structure of the rule establishes a presumption of withholding.

Contrary to respondents' contention (Resp. Br. 31-32), the Exemption 3(B) status of Rule 32(c)(3)(E) is not undermined by the fact that it allows the sentencing court (and, by extension, the Parole Commission and Bureau of Prisons) to decide whether the usual rule of nonrelease should be dispensed with in a particular case. Although under Exemption 3(A) a statute must require withholding "in such a manner as to leave no discretion on the issue" (5 U.S.C. 552(b)(3)(A)), Exemption 3(B) contains no such limitation. See *CIA* v. *Sims*, 471 U.S. at 180-181; *DeLaurentiis* v. *Haig*, 686 F.2d 192, 195-197 (3d Cir. 1982). Nor is the qualifying status of Rule 32(c)(3)(E) undermined by the fact that the Rule does not contain specific criteria for determining when a copy of a presentence report will be withheld or released. The first portion of Exemption 3(B) does require that a qualifying statute establish "particular criteria for withholding"; but the second portion, at issue here, contains no such requirement, because it instead requires the statute to identify the *matters* that may be withheld.

b. Respondents contend (Resp. Br. 25-28), however, that even if Rule 32(c)(3)(E) satisfies the specified criteria, it does not qualify as an Exemption 3(B) statute because it does not expressly refer to the withholding of presentence reports by the Parole Commission and Bureau of Prisons, as well as the court. The short answer to this contention is that Exemption 3(B) does not require that the exempting statute list the agencies entitled to withhold the specified items. Moreover, nothing in Exemption 3(B) suggests that records that concededly are protected from mandatory disclosure when they are in the possession of one governmental entity somehow lose that protection when they are transferred to another governmental entity. Compare *FBI* v. *Abramson*, 456 U.S. 615, 624-625, 628-629 (1982). Nor do respondents offer any reason why such a peculiar and self-defeating limitation should be read into the unqualified language of Exemption 3(B).



Respondents' only answer to this point is their repeated contention (Resp. Br. 17, 25, 26, 28, 30, 32, 36 n.5) that our position is identical to the argument, which we abandoned in our brief in opposition to the certiorari petition in *Crooker* v. *Parole Commission*, 469 U.S. 926 (1980), that presentence reports are court records (not "agency records" subject to the FOIA) because the sentencing court controls the Parole Commission's use and dissemination of the reports. But, first, we expressly argued in our brief in opposition in *Crooker* (at 18-20) that although a presentence report in the possession of the Parole Commission is an "agency record," it is protected against mandatory disclosure by Exemptions 3 and 5, the same Exemptions upon which we rely here. Second, we do not argue here that either Rule 32(c)(3)(E) or the sentencing court "controls" the Parole Commission's use or release of the report, or that the Parole Commission is automatically bound by whatever disclosure decision the court makes. Our submission is only that Rule 32(c)(3)(E) gives the sentencing court, the Parole Commission and the Bureau of Prisons the *same* authority to decide whether to withhold from a prisoner the copy of the presentence report that is in its possession. Nothing in the Parole Act precludes the Parole Commission from exercising its independent authority in this regard by adopting a policy governing the release of presentence reports that is harmonious with that of the sentencing court and the Bureau of Prisons.[12] That is all that the Parole Com-

[12] The legislative history upon which respondents rely for the proposition that the Commission must exercise independent judg-

mission has done, as reaffirmed most recently in its rejection of the Public Citizen Litigation Group's petition for a rule providing for the routine release of presentence reports to prisoners. See Gov't Br. 39-42; pages 14-15, *supra*.[13]

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ment regarding the release of presentence reports actually stands only for the far more limited proposition that the Parole Commission is not bound at a parole hearing by the sentencing court's decision to summarize certain information in the report, rather than allow the defendant to read it. See Resp. Br. 26-27 (quoting 121 Cong. Rec. 15705 (1975) (remarks of Rep. Drinan)).

[13] We also argued in our opening brief (see Gov't Br. 8-9, 23, 35-38, 45-46) that the "reasonable access" provision of 18 U.S.C. 4208(b), when read against the background of the parallel disclosure provisions in Rule 32, is properly interpreted to authorize withholding of presentence reports and therefore to be an Exemption 3(B) statute. Respondents' principal answer to that contention is that the legislative history of the Parole Act shows that Congress wanted to ensure that prisoners have access to information on which parole decisions are based. See Resp. Br. 29 (quoting 121 Cong. Rec. 15705 (1975) (remarks of Rep. Drinan); *id.* at 15708 (remarks of Rep. Coughlin)). Those passages, however, refer to the prisoner's right to see his report prior to his parole hearing, which is not at issue here. The quoted passages in no way suggest an intention to require the Parole Commission to disregard the actions of the sentencing courts by routinely giving prisoners copies of their presentence reports to keep; such a requirement would have promoted discord between the Commission and the courts and conflicted with the contemporaneously enacted Rule 32(c)(3)(E).

Nor does the Parole Commission's practice of not releasing copies of presentence reports to prisoners without the concurrence of the sentencing court undermine the ability of prisoners to assure that decisions by prison officials will not be made on the basis of inaccuracies in the reports, as respondents also contend (Resp. Br. 33). The prisoner is afforded an opportunity to challenge alleged inaccuracies in the report at the time of sentencing, and the court's resolution of those challenges must be transmitted to the Parole Commission and Bureau of Prisons along with the presentence report. See Fed. R. Crim. P. 32(c)(3)(D).



## CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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